Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

DIGITRON PACKAGING, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is the opinion of the United States Court of Appeals for the Sixth Circuit, holding that the participation of the supervisors in a union organizing drive was not coercive, in conflict with precedent of the United States Court of Appeals for the Ninth Circuit?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Digitron Packaging, Inc., and the Respondent, National Labor Relations Board.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the appendix hereto, p.1a, *infra*.

The opinion and order of the National Labor Relations Board is reported at 306 NLRB No. 67, and is reprinted in the appendix hereto, p.22a, *infra*.

JURISDICTION

On June 1, 1993, the United States Court of Appeals for the Sixth Circuit enforced an order of the National Labor Relations Board. The Sixth Circuit denied Digitron's Petition for Rehearing En Banc on August 4, 1993. Digitron invites the jurisdiction of this Court to issue a Writ of Certiorari under Section 10(e) of the National Labor Relations Act, as amended (the "Act"). 29 U.S.C. § 160(e); *See* 28 U.S.C. § 1254(1).

Petitioner, Digitron Packaging, Inc. ("Digitron")[1] respectfully petitions this Court to reverse a judgment and order of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") and deny enforcement to an order of the National Labor Relations Board ("NLRB" or the "Board").

[1] In compliance with Rule 29.1 of the Rules of the Supreme Court of the United States, Digitron states that it has no parent company or subsidiaries except wholly owned subsidiaries.

STATEMENT OF THE CASE

This case presents the important and frequently recurring question of the extent to which a company's supervisory employees may lend aid and assistance to a labor union's organizing efforts without destroying the "laboratory conditions" required under the law for a fair election free from coercion.

Digitron is a contract packager engaged in the repackaging of automobile parts for shipment. On November 13, 1990, Local No. 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO ("the Union") filed, with Region 7 of the National Labor Relations Board ("the Board"), a petition for a representation election involving Digitron's production and maintenance employees. Appendix at 2a.

A representation hearing was scheduled for December 11, 1990, to decide issues relevant to the appropriate bargaining unit. On December 11, an informal pre-hearing meeting was held between representatives of the parties and their respective attorneys at the offices of Region 7 of the NLRB. Appendix at 33a. The discussion at this meeting focused mainly around the issue of whether Digitron's Production Analysts were supervisors under the National Labor Relations Act ("the Act") (29 U.S.C. § 151 *et seq.*) and, thereby, ineligible to vote in the election. The Union's initial position was that the Production Analysts were not supervisors; Digitron's position was that they were supervisors within the meaning of the Act. An agreement was reached between the parties that the Production Analysts were, indeed, supervisors under the

Act. As a result, a Stipulated Election Agreement was signed by the parties and approved by the Regional Director for Region 7 on December 11, 1990. Appendix at 33a-34a. The parties also signed a factual stipulation which was attached to the formal Election Agreement describing the supervisory authority of the Production Analysts. Pursuant to the Agreement, the appropriate unit of eligible voters was established as follows:

> All full-time and regular part-time production and maintenance employees including shipping and receiving employees, hi-lo operators, packers, plant clerical employees, inventory control employees and quality control employees employed by the Employer at its facility located at 12350 Sears Drive, Livonia, Michigan; but *excluding* all temporary employees employed by Temporary Associates, Inc. and/or other employers, office clerical employees, professional employees, guards, *production analysts and other supervisors as defined in the Act.*

Appendix at 34a. (Emphasis supplied).

On January 18, 1991, an election was held, with the Tally of Ballots showing thirty-two (32) votes cast for the Union, twenty-eight (28) votes cast against the Union, and twelve challenged ballots. Appendix at 34a. Digitron and the Union subsequently entered into a Stipulation Resolving Challenged Ballots and a Revised Tally of Ballots was issued. The matter was resolved by agreement that the challenges be sustained because the challenged ballots were cast by individuals employed by Digitron as Production Analysts and were thereby *specifically excluded* from the stipulated bargaining unit set forth above

because they were supervisors. Appendix at 34a-35a. On January 31, 1991, the Regional Director for Region 7 issued a Revised Tally of Ballots showing thirty-two (32) votes cast for the Union, twenty-eight (28) votes cast against the Union, with twelve (12) sustained challenges to ballots. Appendix at 35a.

On January 25, 1991, Digitron filed timely Objections To Conduct Affecting The Results Of The Election. In the objections, Digitron contended that numerous instances of pro-union activity by Production Analysts had a coercive effect on bargaining unit employees, thus tainting the election. Those activities can be divided into three categories: (1) pre-election day meetings; (2) miscellaneous statements made by Production Analysts during the course of the campaign, and (3) election day activities. Appendix at 35a-36a.

On January 31, 1991, the Regional Director issued a Notice of Hearing having concluded that the Employer's Objections "raised substantial and material factual issues." Appendix at 36a. A Hearing was conducted on the Objections on February 14 and 15, 1991, before Hearing Officer Patrick Labadie at Region 7 in Detroit, Michigan. Appendix at 36a. On April 8, 1991, the Hearing Officer issued his Report and Recommendation on Objections, finding that Digitron's Production Analysts were supervisors within the meaning of the Act, but recommending that all of Digitron's Objections be overruled and that a Certification of Representative issue. Appendix at 33a-63a.

In finding that the Production Analysts were supervisors under the Act, the Hearing Officer made several

important findings which were adopted by the Board and the Sixth Circuit. The Hearing Officer found that at the time of their hire, the Production Analysts were provided with copies of their job descriptions which outlined their major responsibilities including *reviewing and tracking subordinate's performance and documenting and administering disciplinary actions*. Appendix at 39a. Notably, the Hearing Officer found that the Production Analysts began issuing disciplinary forms upon completion of their training period and, in fact, had issued disciplinary forms for subordinates on numerous occasions. Appendix at 40a. The Hearing Officer also found that the Production Analysts prepared employee evaluations for employees under their supervision. The Hearing Officer summarized his findings in this regard as follows:

> I find, further, that by granting the production analysts the authority to issue discipline to employees, prepare evaluations of employees and by providing the production analysts with a separate work station, the Employer has given the production analysts the appearance of authority such that employees could reasonably believe the production analysts were supervisors within the meaning of the Act. Each production employee who testified acknowledged that they considered the production analysts to be their supervisor.

Appendix at 49a.

The Hearing Officer also made several important findings regarding the conduct of the Production Analysts during the critical pre-election period and during the election. First, the Hearing Officer determined that Production Analyst Michael Robertson "played a

lead role" at the initial meeting of employees which was held to discuss the possibility of organizing. Appendix at 51a. At this meeting, which was held at the Union Hall, the Hearing Officer also determined authorization cards were signed. Appendix at 50a. The Hearing Officer also found that Production Analyst Robertson announced to the group that if more than fifty percent of the employees signed authorization cards, the Union would automatically become the bargaining agent. Appendix at 51a-52a. Finally, the Hearing Officer determined that a total of five or six other Production Analysts were present at this meeting. Appendix at 50a.

The Hearing Officer made several relevant determinations regarding a second organizing meeting which was held in December of 1990. First, the Hearing Officer noted that at the second meeting, Production Analysts and bargaining unit employees were present in equal numbers. Appendix at 51a. At that meeting, Production Analyst Robertson continued to state his support for the Union and, in addition, stated that the employees "might get fired" without a Union and that if the Union was voted in, employees would get more benefits. Appendix at 52a. The import of this statement must be considered in the context of the fact that as a Production Analyst, Robertson had, among other supervisory responsibilities, the authority to discipline employees and was responsible for completing performance evaluations for bargaining unit employees.

The Hearing Officer also made certain determinations regarding other pre-election conduct of the Production Analysts. The Hearing Officer found that Packer Phyllis Huff was told by Production Analyst Robert

Sleeper that he was a Union supporter. Appendix at 53a. Maintenance employee Jim Holliday testified that about a week before the election, Production Analyst Robertson informed four shop employees "that the employees needed [the Union] and that there would be trouble if the employees did not select [the Union] as their bargaining representative." Appendix at 53a.

Finally, the Hearing Officer made important findings regarding the conduct of Production Analysts during the election process. Most important was the fact that, despite the clear knowledge that they had been found to be supervisors, seven (7) of the Production Analysts appeared at the voting area when the polls opened and voted in the election. Appendix at 8a. Testimony of maintenance employee Holliday established that he observed four (4) Production Analysts in line to vote and that employees who were in line to vote "seemed to be" upset that the Production Analysts were voting. Appendix at 9a.

It was within this record of numerous examples of supervisory activities in support of the Union that the Hearing Officer denied Digitron's objections. Digitron filed exceptions, with a brief in support, with the Board.

Thereafter, on September 30, 1991, the Board adopted the Hearing Officer's finding and recommendations, and found that a Certification of Representative should be issued. Appendix at 24a.

On October 25, 1991, the Union filed a charge with the Board alleging that Digitron had violated Sections 8(a)(1) and (5) of the Act, (29 U.S.C. § 158(a)(1) and (5)), by refusing to bargain with the Union. On November 7,

1991, the Board's General Counsel issued a Complaint. Digitron filed an Answer, asserting *inter alia*, that the Board's certification of the Union was erroneous. On January 3, 1992, the General Counsel filed a motion for summary judgment, which the Board granted by decision and order dated February 21, 1992.[2] Appendix at 22a-30a.

On March 5, 1992, Digitron petitioned the United States Court of Appeals for the Sixth Circuit to review the Order of the Board requiring Digitron to bargain with the Union. The Board filed a cross-application in which it sought enforcement of its order requiring Digitron to bargain with the Union. On June 1, 1993, the Sixth Circuit issued a *per curiam* decision, with a strong dissent by Senior Judge Wellford, denying Digitron's petition for review and granting the Board's petition for enforcement. Appendix at 1a-21a. On August 4, 1993, the Sixth Circuit denied Digitron's petition for rehearing en banc. Appendix at 64a.

From the foregoing, the Board and the Sixth Circuit have concluded that the Union's enlistment and utilization of supervisory personnel in its campaign and during the pre-election period did not have the effect of coercing eligible employees in exercising their right to a free election. The Board and the Sixth Circuit have also ruled that "the presence of supervisors in the voting line does not have a coercive effect on employees' exercise of their protected rights, in the absence of actual conduct which

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[2] Refusing to bargain in this manner is the only way an employer may seek judicial review of a Board decision certifying a union as a bargaining representative.

would have impeded a free election." Appendix at 17a. There is no authority in any Circuit which upholds the Board's position on this important matter. Appendix at 68a-69a.

The essence of this petition is that the Sixth Circuit in *Digitron Packaging, Inc. v. NLRB,* (Nos. 92-5316, 92-5487, June 1, 1993), ruled in a manner which is irreconcilable with an employee's right to a full and fair election free from coercion and which presents a clear conflict with the United States Court of Appeals for the Ninth Circuit. Acting in accordance with existing precedent, the Sixth Circuit should have granted Digitron's petition for review and found that it did not engage in an unfair labor practice by refusing to bargain with the Union.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT HAS CREATED A CONFLICT WITH THE NINTH CIRCUIT BY FAILING TO HOLD THAT ACTIVE SUPERVISORY PARTICIPATION IN A UNION ORGANIZING CAMPAIGN WHICH REASONABLY TENDS TO HAVE A COERCIVE EFFECT ON, OR IS LIKELY TO IMPACT AN EMPLOYEE'S CHOICE, DESTROYS LABORATORY CONDITIONS AND PREVENTS EMPLOYEES FROM EXERCISING AN UNCOERCED VOTE.

It is well settled that pro-union activities by supervisors can constitute objectionable conduct requiring setting aside an election. *NLRB v. Roselon Southern, Inc.,* 382 F.2d 245 (6th Cir. 1967). The Board and courts have found that supervisory participation in a union organizing campaign can constitute objectionable conduct on two

grounds. The first objectionable scenario occurs when supervisors actively encourage employees to vote for the union and the employer takes no stance to the contrary. This objectionable scenario was *not* present in the instant case because although the Union utilized Production Analysts as active campaigners, Digitron did state its position to the employees that it did not believe that a union was in the best interests of Digitron or the employees.

The second objectionable scenario emanates from the fact that due to the continuing relationship between supervisors and employees, pro-union activities by supervisors can coerce employees into supporting the union *"out of fear of retaliation by a union-oriented supervisor." Sheraton Motor Inn*, 194 NLRB 733, 734 (1971) (emphasis added). This objectionable scenario was clearly present in the instant case and should have resulted in the Sixth Circuit granting Digitron's petition for review. However, the Sixth Circuit ruling is inconsistent with this standard. More importantly, the Sixth Circuit's approach is in direct conflict with the approach of the Ninth Circuit. Because of this conflict, this petition should be granted.

In determining whether such objectionable conduct has occurred, the Board and the courts *do not require actual proof of coercion*. The Ninth Circuit has addressed this issue in detail and has applied a most reasonable standard to such an analysis. The Ninth Circuit has held that supervisory pro-union activity need only "reasonably tend" to "coerce" employees' votes in a representation petition. *Cal-Western Transport*, 283 NLRB 453, 455,

aff'd., 870 F.2d 1481 (9th Cir. 1989).[3] In *NLRB v. Island Film Processing Co., Inc.*, 784 F.2d 1446 (9th Cir. 1986), the Ninth Circuit further explained its approach, when it provided in relevant part as follows:

> Active supervisory participation in a union organizing campaign destroys laboratory conditions and prevents employees from exercising an uncoerced vote. Such involvement requires an election to be set aside . . . The courts, however, have never required actual proof of coercion. Supervisory activity need only "reasonably tend" to have a coercive effect on or "likely to impair" an employees choice. . . . Implied threats of retaliation suffice to taint an election.

Id. at 1451. (Citation omitted).

The Ninth Circuit has further stressed that the mere *potential* for such coercion will suffice to invalidate an election:

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[3] In *Cal-Western Transport*, the Ninth Circuit held that the conduct of the supervisor in question did not "taint" the election. The facts of that case are clearly distinguishable from the instant action in that the Ninth Circuit found that the supervisor's only use of independent judgment surrounded the assigning of drivers to delivery routes. Notably, the Court found that the supervisor did not conduct employee evaluations or disciplinary interviews. 870 F.2d at 1485. Similarly, in *Napili Shores Condominium v. NLRB*, 939 F.2d 717 (9th Cir. 1991), the Ninth Circuit found that the alleged supervisory misconduct did not taint an election. However, in that instance, the Ninth Circuit found that the only evidence of supervisory misconduct was hearsay statements that the supervisor had made "pro-union" statements to employees. 939 F.2d at 717. In the instant case, there is no issue as to whether or not the "pro-union" conduct took place.

> The type of solicitation which invalidates a union selection process is one that must "contain the seeds of *potential* reprisal, punishment, or intimidation [or] the involvement of supervisors does not rise to the level of supervisory 'solicitation'."

784 F.2d at 1452, (emphasis supplied), *citing, Global Marine Development of California v. NLRB*, 528 F.2d 92, 95 (9th Cir. 1975), *cert. denied*, 429 U.S. 821, 97 S.Ct. 70, 50 L.Ed.2d 83 (1976).

Therefore, in applying the Ninth Circuit standard, the Sixth Circuit was required to review the record as a whole to determine if the Production Analysts' conduct "laid the foundation for potential coercion of employees." 784 F.2d at 1452. The Sixth Circuit failed to apply this standard.

Instead, the Sixth Circuit's holding represents a clear departure from the Ninth Circuit approach and will likely result in differing standards being applied to unions and employers attempting to exercise their respective rights within those judicial circuits. As noted by the Sixth Circuit's strong dissenting opinion by Senior Judge Wellford in the instant case, in *Island Film*, the Ninth Circuit emphasized the power of supervisors to reward or punish employees under their direction and control, regardless of whether such supervisors were found to occupy only "minor" supervisory roles. *Island Film*, 784 F.2d at 1450. The Ninth Circuit has stated that the distinction between major and minor supervisors is not compelling. Rather, consideration must be given to "both the extent of the supervisor's authority and the extent of his pro-union activity." *Id.* at 1451, *citing, ITT Lighting Fixtures v. NLRB*,

658 F.2d 934 (2d Cir. 1981), *appeal on remand*, 712 F.2d 40 (2d Cir. 1983), *cert. denied*, 466 U.S. 978 (1984). In *Island Film*, the Ninth Circuit found that the Hearing Officer "did not adequately support his finding that the supervisors possessed only 'minor authority'." 784 F.2d at 1452. Specifically, the Ninth Circuit held that the Hearing Officer did not adequately consider the ability of the supervisors to approve overtime, grant time off and to discipline employees.[4]

In its opinion, the Sixth Circuit makes an issue of the fact that the level of authority possessed by the Production Analysts was not of the type to "greatly affect the working conditions of the packers." In making this distinction, the Sixth Circuit seemingly ignores its own finding that the Production Analysts possessed the authority to exercise "responsible direction" and "independent discretion." The Sixth Circuit found in the instant case that this discretion included the authority of the Production Analysts to discipline employees, to evaluate their work, and to transfer employees from one work location to another. Appendix at 8a.

It is within the framework of this statutory definition and factual scenario that the Hearing Officer, as affirmed

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[4] Moreover, this distinction has been found by other Circuit Courts to be without basis. In *Turners Express, Inc. v. NLRB*, 456 F.2d 289 (4th Cir. 1972), the Fourth Circuit disregarded the Board's determination that as "minor supervisors," the supervisors' (Robbins and Tebo) pro-union activities could not have destroyed laboratory conditions, stating that: "The Board's designation of Robbins and Tebo as 'minor supervisors' is not supported by the evidence or the law. The Act does not grade supervisors as major or minor. An individual is either a supervisor or an employee." *Id.* at 291

by the Board and the Sixth Circuit, determined that the Production Analysts were supervisors. Notwithstanding this vital determination, however, the Sixth Circuit went on to find that "the level of authority possessed by the Production Analysts was not of the type to greatly affect the working conditions of the packers." Appendix at 16a. These two findings are simply inconsistent.

Applying the Ninth Circuit standard should have resulted in the Sixth Circuit balancing the extent of the Production Analysts' authority and the extent of their pro-union activities, and determining whether the Production Analysts' conduct in light of their authority had the *potential* for coercing employees. In this instance, the unrebutted record reflects that the Production Analysts possessed disciplinary authority, as well as the authority to evaluate employees and to determine their work location. Appendix at 8a. The undisputed record also reveals that Production Analysts played a lead role in the initial organizing meeting; stated that employees "might get fired" if the Union was not voted in; stated that the employees "needed" the Union; stated that there would be trouble if the Union was not voted in; and actually voted in the election, despite their clear knowledge of their supervisory status and explicit instructions from Digitron to stay away from the polling area during the election hours. Appendix at 12a. The Sixth Circuit does not explain how, in light of these facts and in consideration of the authority possessed by the Production Analysts, the potential for coercive effect did not exist.

The Sixth Circuit's attempt to factually distinguish *Island Film* is not compelling. The Sixth Circuit notes that in *Island Film*, the supervisors signed authorization cards

in front of employees, engaged in almost continuous conversations at the workplace and vocalized their support of the union to those who voted. The Sixth Circuit then notes that the Production Analysts did not engage in such conduct. However, the Sixth Circuit fails to evaluate the conduct in which the Production Analysts did engage, including leading the initial organizing meetings, telling employees during the initial organizing meeting that if more than fifty percent of the employees signed cards, the Union would automatically become the bargaining agent, making threatening comments and actually voting in the election. Appendix at 12a and 51a-52a. With regard to the issue of soliciting employees, the Sixth Circuit relies on the fact that the Production Analysts did not actually sign authorization cards or "actively solicit signatures." Appendix at 16a. The Sixth Circuit ignores the fact that Production Analyst Robertson lead the first meeting and stated that getting over fifty percent of the cards signed would result in the Union becoming a bargaining agent. Such conduct clearly constitutes solicitation. The Sixth Circuit's holding that these activities did not comprise solicitation constitutes making a distinction without a difference.

The Ninth Circuit's holding does not create a checklist of coercive activities against which courts should evaluate the conduct of specific cases, but, rather, provides examples of conduct which have the potential for coercion. In this light, the Sixth Circuit finds that the Production Analysts, who inarguably possessed the authority to discipline and evaluate employees, could not "greatly affect" working conditions of the employees. The

Sixth Circuit does not explain what greater effect supervisors could have on employee working conditions than to discipline them or to evaluate their work performance.

The Sixth Circuit also fails to acknowledge the importance of considering the closeness of the election in evaluating the impact of supervisory conduct. As pointed out by Senior Judge Wellford's dissent to the Sixth Circuit's opinion, "this was an exceedingly close election wherein a change of mind of two voters out of seventy-two ballots cast could have modified the result of the election." Appendix at 17a-18a. As Judge Wellford stated:

> In our review of a case of this kind involving improper supervisory activities, our sensitivity to the potential of employee apprehension (or misapprehensions) must increase in inverse proportion to the margin of the election result. (The smaller the margin, the greater concern about effect of supervisory over-reaching and influence upon the election result.) *See C.J. Krebbiel Co. v. NLRB*, 884 F.2d 880 (D.C. Cir. 1988); *Jamesway Corp. v. NLRB*, 676 F.2d 63, 71 (3d Cir. 1982).

Appendix at 19a.

Despite the obvious relevance of an election swing of two votes among a voting group of over seventy employees, the Sixth Circuit opinion does not even address this issue. However, in accordance with the above precedent, the Sixth Circuit should have evaluated the conduct of the Production Analysts in light of the closeness of the election. In this context, it is clear that the Sixth Circuit failed to consider the "seeds of potential reprisal, punishment, clear threat or intimidation" as it may have applied to only one or two employees whose

change of vote would have altered the outcome of the election.

For all of these reasons, Digitron strongly asserts that the Sixth Circuit's decision is in error, and creates a clear conflict with the holding of the Ninth Circuit Court of Appeals on the same issue. Accordingly, Digitron respectfully suggests that this conflict merits review by this Court.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Petitioner

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August 27, 1993

Nos. 92-5316, 92-5487

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIGITRON PACKAGING, INC.,	
Petitioner, Cross-Respondent,	ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
v.	ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD,	NATIONAL LABOR RELATIONS BOARD
Respondent, Cross-Petitioner.	(Filed June 1, 1993)

BEFORE: JONES and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

PER CURIAM. Digitron Packaging, Inc. ("Digitron") petitions for review of and the National Labor Relations Board (the "Board"), in its cross-application, seeks enforcement of a Board order issued on February 21, 1992 commanding Digitron to bargain with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the "Union"). For the reasons that follow, we deny Digitron's petition for review and we grant the Board's petition for enforcement of its February 21, 1992 order.

I.

Digitron is a contract packager in the business of repackaging automobile parts for shipment. On November 13, 1990, the Union filed a petition for a representation election involving all full-time and regular part-time employees at Digitron's facility in Livonia, Michigan.

An election was held on January 18, 1991. The final tally of votes showed that of the seventy-two votes cast, thirty-two were for the Union and twenty-eight were against the Union. Twelve votes were not counted because those votes were successfully challenged as being votes of supervisors.

After the election, Digitron filed objections to the election. Digitron contended that the pro-union activity by production analysts had a coercive effect on employees, thus tainting the election. Digitron pointed to several instances which it contended showed that production analysts improperly solicited or coerced employee votes. The activity by the production analysts which Digitron objected to can be divided into three categories: 1) pre-election day meetings, which encompasses activity that occurred at several meetings which were held in an attempt to organize the employees; 2) miscellaneous statements, which include various statements attributed to some of the production analysts; and 3) election day activities, which include what took place during the time the production analysts were in the polling area the day of the election. Digitron also objected to the action of the Board Agent in allowing the production analysts, which Digitron claims were known to her to be

supervisors, to enter and remain in the polling area during the January 18, 1991 election.

A Hearing Officer held a hearing concerning Digitron's objections. In his report and recommendation, the officer noted the following was testified to at the hearing:

A. Pre-Election Day Meetings

1. Initial Meeting at Union Hall

In early November 1990, an initial meeting of employees was held to discuss the possibility of organizing. Carlos Toro, a packer at Digitron, testified that while there were authorization cards signed at the meeting, no production analysts encouraged employees to sign the cards.

Alan Talluto, a former production analyst who was promoted to general supervisor, testified that he was also present at the November 1990 meeting and that Michael Robertson, a production analyst, played a lead role at the meeting. Talluto testified that Robertson was " 'sitting up front doing a lot of talking, a lot of one on one conversation with Tom' (Ziembovic[, a Union organizer])." J.A. at 12. Talluto testified that Robertson stated that if more than fifty percent of the employees signed authorization cards, the Union automatically became the bargaining representative. Talluto noted that Robertson did not ask employees to sign authorization cards for the Union, however.

2. Wonderland Mall Meeting

Toro also testified that he was present at a meeting which was held during the third week of December 1990 at the Wonderland Mall in Livonia. At that meeting, there were approximately six to eight employees and seven production analysts. Toro testified that at the meeting Robertson expressed his support for the Union to employees who were sitting with him at a table. In addition, Robertson stated that the employees might get fired without a union and that if the Union was voted in, employees would get more benefits.

Talluto was also present at the Wonderland Mall meeting. Talluto testified that Robertson conducted the meeting and, in response to a question, told a group of about ten employees that Digitron knew who had signed the authorization cards and that if the Union did not get voted in, those employees would be discharged.

Robert Sleeper, a production analyst, testified that at the Wonderland Mall meeting no one employee or production analyst dominated the meeting and denied that Robertson told employees that they would be discharged or laid off by Digitron.

3. Archie's Restaurant Meeting

Talluto was also in attendance at a meeting held on December 21, 1990 at Archie's Restaurant. At this meeting, there were seven production analysts and one packer, Mable Whitehurst. Ziembovic was also present. Talluto testified that Ziembovic told the production analysts that Digitron was going to contend that they

were supervisors and that their votes would be challenged at the election.

B. Miscellaneous Statements

Phyllis Huff testified that Sleeper told her about a month and a half before the election that he supported the Union. Huff admitted that they were " 'casually talking' " when Sleeper expressed his support for the Union. *Id.* at 13. In addition, Huff testified that she did not hear any production analyst threaten any employee regarding how the employees should vote. Sleeper denied that he ever told employees how he felt about the Union.

Jim Holliday, a maintenance employee, testified that a week prior to the election he heard Robertson state to four employees that the employees needed the Union and that there would be trouble if the employees did not select the Union as their bargaining representative. Holliday also stated that this was the only time he heard a production analyst speaking about the Union.[1]

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[1] Additional statements by production analysts were described by another packer, Sergio Filas. Filas' testimony, however, was rejected by the Hearing Officer. After initially being unwilling to testify, Filas was found to be "very nervous," "unsure of himself" and "unsure of his answers" by the Hearing Officer. J.A. at 13. The officer also found that Filas' testimony suffered from a "general lack of specifics." *Id.* The Hearing Officer determined that "based on his demeanor as a witness I have not relied in any way on his testimony and I reject it as a basis for any findings of fact." *Id.*

C. Election Day Activities

The Hearing Officer found that the voting was held from 1:30 p.m. to 2:30 p.m. in the office conference room. At 2:00 p.m., Digitron called a meeting of the production analysts in Dick Racine's office. Racine was Digitron's Operations Manager. At the same time, seven production analysts came to the voting area and stood in line to vote. Racine testified that when he noticed that only five production analysts appeared for the 2:00 p.m. meeting, he concluded that the remaining production analysts had gone to vote. Racine then testified that he allowed the production analysts at the meeting to go and vote.

Talluto testified that while he was in line to vote he heard employees make comments to him and other production analysts who had attended the 2:00 p.m. meeting. Those comments indicated that those production analysts were sent to counteract the seven votes of the production analysts who had not attended the meeting before coming to vote. Talluto testified that Whitehurst began "pointing at employees in line and stating that with these employees voting they did not have a chance." *Id.* at 16.

Holliday testified that he was asked by Racine to accompany another employee to the voting area because Racine was concerned that this employee would be intimidated. Holliday testified that this employee ducked behind him after seeing Whitehurst. Holliday also testified that he saw four production analysts in line to vote and that the employees seemed to be upset that the production analysts were voting. Holliday testified that while in line he did not hear the production analysts say

anything about the Union or make any statements to employees as to how they should vote.

Robertson was one of the production analysts who did not go to the 2:00 p.m. meeting. Robertson stated that he was in line for about two minutes, voted, and then left the voting area. He denied speaking about the Union while waiting in line to vote. Sleeper testified that he and the six other production analysts who had not attended the meeting were in a group and that he was in line for about 45 minutes.

Toro testified that on the day of the election, Robertson and another production analyst, Dorothy Garrett, asked him how he was going to vote. Toro testified that Robertson did not ask this question in a threatening manner. Toro also stated that he did not see any production analysts attempting to influence employees on the day of the election.

In addition to noting the foregoing testimony, the Hearing Officer found that the production analysts were supervisory personnel within the meaning of Section 2(11) of the Labor Management Relations Act, 29 U.S.C. § 152(11) (1988) [hereinafter the "Act"]. In support of this finding, the Hearing Officer stated:

> The record establishes that [production analysts] are the highest paid individuals in the production portion of the Employer's operation. They do not have a regular assigned work location on the production line but instead have their own standing work desks at the beginning of each line. They wear a green apron to distinguish them from the rest of the production employees, who wear regular street clothes. In addition to

> each secondary indicia of supervisory status, the credible record evidence establishes that the production analysts have some limited authority to transfer packers from one location on the line to another and orally warn employees regarding their work performance. Furthermore, there is evidence that the production analysts can check packers [sic] work and if not satisfied with the work have them redo it. I find such to be an exercise of responsible direction and indicative of a supervisor's use of independent discretion.

J.A. at 9.

After finding that the production analysts were supervisory personnel, the Hearing Officer found that the pre-election actions and comments, including the miscellaneous statements, attributed to the production analysts – namely Robertson and Sleeper – were not made to coerce the employees to vote for the Union or face retaliation.[2] As for the production analysts' election day actions, the Hearing Officer stated:

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[2] The Hearing Officer discredited certain testimony. He discredited Talluto's testimony to the extent that it contradicted Toro's version of what Robertson said at the Wonderland Mall meeting. The Hearing Officer stated that "Toro's version of Robertson's statement that employees 'might' be discharged is a more credible version." *Id.* at 12. The Hearing Officer determined that since Robertson was a low-level supervisor, it was highly unlikely that Digitron would have told Robertson of its plans. As a result, the Hearing Officer concluded that Robertson was merely speculating as to what Digitron would do and he was merely speaking of the possibility of Digitron action. Thus, the Hearing Officer concluded, "based on the demeanor of the witnesses and the inherent probabilities of the events set forth in witness testimony I credit Toro in this regard." *Id.* The Hearing Officer discredited Sleeper's testimony with respect to the

> . . . I would not find the actions of the production analysts in attempting to vote sufficient to constitute a basis for overturning the election. There was no testimony presented by any witness that the production analysts while in line attempted to even start a conversation with another employee other than Mable Whitehurst let alone attempt to coerce employees regarding their vote.

Id. at 17. The Hearing Officer also found that the Board Agent engaged in no improper action on the day of the election by allowing the production analysts to cast challenged ballots.

As a result, the Hearing Officer recommended that Digitron's objections be overruled. On September 30, 1991, the Board adopted the Hearing Officer's report and recommendation and certified the Union as the collective bargaining representative for the employees. Thereafter, Digitron refused to bargain with the Union. The Union filed a charge with the Board alleging that Digitron refused to bargain with the Union. The Board's General Counsel issued a complaint alleging that Digitron's refusal to bargain with the Union violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5) (1988). In its answer, Digitron conceded that it refused to bargain. It alleged that the Union was not properly certified. The Board's General Counsel then filed a motion for summary judgment with the Board.

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denial of Robertson's statement made at the Wonderland Mall meeting. In addition, the officer rejected Sleeper's testimony with respect to his denial that he told Huff that he supported the Union.

On February 21, 1992, the Board granted the General Counsel's motion for summary judgment, finding that Digitron was seeking only to relitigate issues determined in the representation proceeding. The Board found that Digitron's refusal to bargain violated 29 U.S.C. §§ 158(a)(1) and (5).

The Board's accompanying order requires Digitron, among other things, to cease and desist from refusing to bargain. The order directs Digitron to bargain with the Union and furnish relevant information, to embody any understanding in a signed agreement, and to post a remedial notice.

II.

The issue we are faced with is whether the Board, in overruling Digitron's objections and certifying the Union, acted within the "wide degree of discretion" entrusted to it by Congress in resolving questions arising during the course of representation proceedings. *Tony Scott Trucking, Inc. v. NLRB*, 821 F.2d 312, 313 (6th Cir.), *cert. denied*, 484 U.S. 896 (1987). We must consider whether the Board acted reasonably in overruling Digitron's election objections and certifying the Union and whether substantial evidence supports the Board's actions. *John M. Horn Lumber Co. v. NLRB*, 859 F.2d 1242, 1243-44 (6th Cir. 1988); *Hickman Harbor Serv. v. NLRB*, 739 F.2d 214, 218 (6th Cir. 1984).

As we stated in *Hickman Harbor*:

> To set aside a representation election it must be proven the election was conducted improperly. Moreover, it must be shown "not only that

> unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." If the Board's factual findings in this area are "reasonable in light of the proven facts," they must be upheld. However, we will not give a factual finding "more weight than in reason and in the light of judicial experience [it] deserve[s]."

739 F.2d at 218 (citations omitted).

In its petition, Digitron raises two major issues. First, Digitron argues that the Board erred in not finding that the Union's enlistment and utilization of supervisory personnel in its campaign immediately prior to the election and during the pre-election period coerced eligible voters into voting pro-Union. Second, Digitron argues that the Board erred in not finding that the election, whose tally was close, should be set aside because "campaigning and electioneering engaged in on behalf of the Union and the extended presence of supervisors in the voting area and other serious irregularities in the conduct of the election destroyed laboratory conditions essential to the conduct of a free and fair election." Petitioner's Br. at 3.

A.

Substantial evidence supports the Board's finding that none of the production analysts, except for Robertson and Sleeper, played a significant role in the organizing campaign. While several production analysts attended meetings at the union hall and at the mall, none of them, including Robertson and Sleeper, distributed

authorization cards to employees or solicited their signatures.

Substantial evidence also supports the Board's finding that Robertson's conduct did not have a tendency to coerce employees into voting for the Union out of fear of retaliation by Robertson or Sleeper. Robertson made no secret of his support for the Union: he shared a platform with Union organizer Ziembovic at the union hall meeting; he spoke in favor of the Union at the mall meeting; he stated at the mall meeting that Digitron knew who had signed union cards and that these employees "might get fired" if the Union lost the election; he stated, about a week before the election, that "there would be trouble" if the Union was rejected; and he was the first production analyst to line up to vote on election day. Similarly, Sleeper expressed his support for the Union to an employee. While those actions may indicate unwavering support for the Union, those activities do not necessarily destroy a free and fair election. As stated by the Ninth Circuit, "Talking to employees about the union, expressing personal views about the union, and answering questions about the union are permissible expressions of opinion when made in noncoercive and nonthreatening circumstances." *NLRB v. Hawaiian Flour Mill, Inc.*, 792 F.2d 1459, 1464 (9th Cir. 1986).

Substantial evidence supports the Board's finding that Robertson's and Sleeper's actions and comments were made under noncoercive and nonthreatening circumstances. While the Hearing Officer correctly found that the production analysts were supervisors, *see, e.g., NLRB v. Roselon Southern, Inc.*, 382 F.2d 245, 247 (6th Cir. 1967), it is important to note that the production analysts

had minimal ability to reward or retaliate against employees: they had limited authority to reassign the packers to other jobs on the line(s) which they supervised; they had limited disciplinary authority; and they made only the initial contribution to the multi-stage evaluation process. The production analysts occupied the bottom rung of Digitron's supervisory hierarchy. As a result, it was unlikely that Robertson's or Sleeper's audience would treat these statements as something other than Robertson's or Sleeper's personal speculations or feelings. Under these circumstances, the Board reasonably concluded that Sleeper's statement to Huff was noncoercive. Even Huff stated that it was noncoercive. Furthermore, the Board reasonably concluded that Robertson's position provided no basis for his assertion about the likelihood of company reprisals against Union supporters if the Union was rejected.

In addition, it was reasonable for the Board to credit Toro's and Holliday's testimony concerning Robertson's comments and Huff's testimony concerning Sleeper's statement and to discredit other witnesses' testimony. As we have stated previously, this Court is in no position to substitute its judgment on issues of credibility for the Hearing Officer's judgment. *Colfor, Inc. v. NLRB*, 678 F.2d 655, 656 (6th Cir. 1982); *accord NLRB v. Baja's Place*, 733 F.2d 416, 421 (6th Cir. 1984) (credibility resolutions of a hearing officer " 'who has observed the demeanor of the witnesses' " are not normally disturbed) (citation omitted). The Hearing Officer commented about the general credibility of each witness he credited or discredited and he detailed the surrounding circumstances which may have made one witness' testimony more believable than

another witness' testimony. *See id.* Digitron offers no persuasive reason for disturbing the Hearing Officer's credibility resolutions in this case.

We also note that any coercive impact of pro-Union activity was mollified by the fact that of the twelve production analysts, only Robertson, and to a far lesser extent, Sleeper, were engaged in pro-Union activity during the pre-election period. *See Hawaiian Flour Mill,* 792 F.2d at 1464 (in finding pro-union activity to be non-coercive, the court noted that only one supervisor was engaged in pro-union activity).

Digitron cites to *Sheraton Motor Inn,* 194 N.L.R.B. 733, 733-34 (1971) as precedent for setting aside an election due to supervisory support of the Union. In *Sheraton Motor Inn,* the supervisor in question had considerable authority over the employees whom he had solicited to join the Union and this authority was concentrated in a single individual. The authority of the production analysts in the instant case does not reach the level of authority found in *Sheraton Motor Inn.* In addition, since there were twelve production analysts, authority was not concentrated in one individual supervisor. This is especially significant because, as stated before, only two production analysts made pro-Union statements, thus militating against the perception that all the supervisors were pro-Union.

In addition to the level of authority held by the production analysts, the other cases cited by Digitron can be distinguished by the level of pro-union activity undertaken by the supervisors. In *Roselon Southern,* 382 F.2d at 247, the supervisors in question actually signed up

employees who were working under them. In the instant case, there is no evidence that any of the production analysts in question actually signed up any of the employees to join the Union. In *NLRB v. Island Film Processing Co.*, 784 F.2d 1446, 1452-53 (9th Cir. 1986), the supervisors signed authorization cards in front of employees and engaged in almost continuous conversation at the work place. Additionally, all of the supervisory personnel vocalized their support of the Union to the employees who voted. In the instant case, the conduct of the supervisors did not rise to this same level of influence. No production analyst signed authorization cards or engaged in the type of continual pro-union conversation described in *Island Film*. The Board determined that the actual statements in question were limited to three or four made by two out of a total of twelve production analysts.

In *Delchamps, Inc.*, 210 N.L.R.B. 179, 179-80 (1974), the supervisors in question had joined the union and solicited employees who worked under them to do the same. A number of the supervisors were on the union's organizing committee and they distributed, solicited signatures to, and collected cards for the union. The supervisors also attended union meetings and urged employees to do the same. In addition, they wore union pins and urged employees to vote for the union. Although there was no finding that the supervisors made threats that the employees under them would not receive wage increases and would suffer other adverse treatment if they did not support the union, the Hearing Officer determined, and the Board agreed, that "because the authorities possessed and exercised by the [supervisors] are of the type which

greatly affect working conditions" the supervisor's pro-union activity would tend to restrain employees in their right to freely exercise their vote. *Id.* at 180.

Again, the level of supervisory activity in the instant case simply does not rise to the same level as found in *Delchamps*. Unlike the supervisors in *Delchamps*, the production analysts who did support the Union did not actually join the Union, much less hold positions on Union committees. There is no evidence that any of the production analysts actually solicited signatures, distributed or picked up Union authorization cards from any of the employees. Nor is there any evidence that the production analysts ever asked an employee to vote for the Union. Additionally, as previously stated, the level of authority possessed by the production analysts was not of the type to greatly affect the working conditions of the packers.

B.

Digitron also contends that the Board Agent impermissibly allowed the production analysts to line up and vote and that improper conversations between the production analysts and employees waiting to vote impaired the employees, freedom of choice.

We conclude that substantial evidence supports the Board's conclusion that the Board Agent did nothing improper. As stated by the Hearing Officer:

> the Board Agent's action in allowing the production analysts to enter the polling place was proper since there had been no determination

> by the National Labor Relations Board regarding the status of the production analysts and their eligibility to vote in the election.

J.A. at 17. We agree with that determination.

As to the alleged conversations between the production analysts and the employees at the voting center, we find that substantial evidence supports the Board's determination that there were not conversations between the two groups which would have impeded a free and fair election. As Toro testified, he did not feel threatened by Robertson's question about how he was going to vote.[3]

III.

We have reviewed Digitron's other contentions and find that they are without merit. Based on the foregoing, we deny Digitron's petition for review and we grant the Board's petition for enforcement.

NOS. 92-5316/5487; DIGITRON PACKAGING, INC. V. NLRB

WELLFORD, Senior Circuit Judge, **dissenting**:

This was an exceedingly close election wherein a change of mind of two voters out of seventy-two ballots

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[3] We also note that Digitron allowed several of the production analysts to leave a meeting that it had previously called, stand in line, and vote. To some degree, Digitron contributed to the situation that it now finds objectionable by encouraging the analysts to vote at that particular time. It may not now complain of the results of its inaction. *See, e.g., NLRB v. Welfed Catfish, Inc.*, 674 F.2d 1076, 1079-80 (5th Cir. 1982); *Fall River Sav. Bank v. NLRB*, 649 F.2d 50, 56 n.5 (1st Cir. 1981).

cast could have modified the result of the election. Several "production analysts," who the union conceded were "supervisors," actively participated in, or conducted, pre-election organizational activities and meetings in open support of the union. Throughout the campaign, these supervisors continued to make various statements to employees showing strong support for the union. During the election these same supervisors were in the polling area carefully observing the employees who were about to vote, and in at least one instance, asked an employee how he was going to vote. At least one production analyst warned or threatened that "employees might get fired without a union."[1] Another told an employee to vote for the union "so that he would not suffer retaliation."

In another case involving supervisory involvement and potential coercion in an organization campaign, and in the ensuing election, we have held that the election should be set aside even though the vote was not close as in this case. *NLRB v. Roselon Southern*, 382 F.2d 245 (6th Cir. 1967). It seems self-evident that the Board is required to examine with particular care the likely effects of fear and intimidation upon employees brought about by supervisory intervention in a union organization campaign where the election margin is a very narrow one. In

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[1] Whether the supervisor's statement was "would be discharged," or "might be discharged," if the employee did not support the union is of little consequence. Also, whether the most active union adherent, Robertson, a production analyst, was only a "low-level supervisor" is not important; he was a *supervisor* who had "independent discretion" and "responsible direction" authority.

our review of a case of this kind involving improper supervisory activities, our sensitivity to the potential of employee apprehension (or misapprehensions) must increase in inverse proportion to the margin of the election result. (The smaller the margin, the greater concern about effect of supervisory over-reaching and influence upon the election result.) *See C.J Krehbiel Co. v. NLRB*, 884 F.2d 880 (D.C. Cir. 1988); *Jamesway Corp. v. NLRB*, 676 F.2d 63, 71 (3d Cir. 1982).

As the Ninth Circuit has noted:

> Active supervisory participation in a union organizing campaign destroys laboratory conditions and prevents employees from exercising an uncoerced vote. Such involvement requires an election to be set aside. . . . The courts, however, have never required actual proof of coercion. Supervisory activity need only "reasonably tend" to have a coercive effect on or "likely to impair" an employees' choice. . . . Implied threats of retaliation suffice to taint an election.

NLRB v. Island Film Processing Co., Inc., 784 F.2d 1446, 1451 (9th Cir. 1986) (citations omitted). *Island Film* emphasized the power of supervisors to reward or punish employees under their direction and control, regardless of whether the supervisors were deemed to occupy only "minor" supervisory roles. *Island Film*, 784 F.2d at 1450; *see also NLRB v. Cal-Western Transportation*, 870 F.2d 1481, 1484 (9th Cir. 1989) ("supervisory support will invalidate the Union's victory if its [sic] *reasonably tends* to have a coercive effect on or is *likely* to *impair* an employee's choice"). (Emphasis added). All that need be shown is that "the supervisor's conduct creates either an impression that the

employer favors the union or a fear of future retaliation." *Cal-Western*, 870 F.2d at 1484 (citing *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459, 1462 (9th Cir. 1986)).

> It has frequently been held that the participation of a supervisor in a union election undermines the "laboratory conditions" necessary for an unfettered choice. . . . As explained in various Board opinions, the threat posed by the participation of a supervisor is twofold. First, if a supervisor takes a stance in favor of the Union, even though the employer does not otherwise indicate its position, his association with the management hierarchy, in an employee's perception, could indicate employer support for the Union. Second, if a supervisor influences hiring and firing or in other respects holds substantial power over an employee, the supervisor's participation in the election could have a coercive effect on other employees.

NLRB v. Handy Hardware Wholesale, Inc., 542 F.2d 935, 938 (5th Cir. 1976), *cert. denied*, 431 U.S. 954 (1977) (citations omitted).

Another court reached the same result and set aside a union election[2] where supervisory action and pro-union "pressure upon employees" was deemed to be coercive. *Turner's Express, Inc. v. NLRB*, 456 F.2d 289, 291 (4th Cir. 1972). Much like this case, the supervisors in *Turner's Express* made statements in favor of the union, encouraged a union organizer to commence his efforts, interrogated employees, and questioned how they would vote.

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[2] The election resulted in 32 votes for the union and 22 against, 6 votes being challenged.

Turner's Express also relied upon *NLRB v. Roselon Southern*, 382 F.2d 245 (6th Cir. 1967), among other authorities, for its decision, maintaining that "[i]t is not necessary that it be proved that such pressure and coercion affected the result of the voting." *Turner's Express*, 456 F.2d at 291.

Taken in context and in light of the entire record, it seems clear that the hearing officer and the Board simply failed to take into account the extent of supervisory activity clearly coercive in nature and prone to bring about employee fear of retaliation if the union did not prevail. While the effort of the production analysts, urged on by the union, to attempt to vote would not be sufficient to overturn the election, this also tended to upset other employees, according to the testimony in the record.

"[A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Jamesway Corp. v. NLRB*, 676 F.2d 63, 66 (3d Cir. 1982) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Accordingly, I would find that the Board exceeded its discretion, and acted without substantial support in the record by failing to find that the supervisory irregularities and misconduct present here precluded a free and fair election. I would, therefore, reverse the Board's decision and set aside the election.

SDR

306 NLRB No. 67

D--2567
Livonia, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIGITRON PACKAGING, INC.

and

Case 7-CA-32494

LOCAL NO. 243, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

DECISION AND ORDER

On November 7, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7-RC-19456. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On January 7, 1992, the General Counsel filed a Motion for Summary Judgment. On January 9, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain and to furnish information that is relevant and necessary to the Union's role as bargaining representative, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). There are no factual issues regarding the Union's request for information because the Respondent admitted that it refused to furnish the information. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, Digitron Packaging, Inc., a Michigan corporation, is engaged in the packaging of automobile parts for nonretail sale and maintains its principal office and place of business at 12350 Sears Drive, Livonia,

Michigan, where, during the year ending December 31, 1990, in the course and conduct of its business operations, it had gross revenues in excess of $500,000 and performed packaging services valued in excess of $50,000 for Ford Motor Company, which during the same time period sold and shipped goods and materials valued in excess of $50,000 from its plants located in the State of Michigan directly to customers located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held January 18, 1991, the Union was certified on September 30, 1991, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including shipping and receiving employees, hi-lo operators, packers, plant clerical employees, inventory control employees and quality control employees employed by Respondent at its facility located at 12350 Sears Drive, Livonia, Michigan; but excluding all temporary employees employed by Temporary Associates, Inc. and/or other employers, office clerical employees, professional employees, guards, production analysts and other supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since October 9, 1991, the Union has requested the Respondent to bargain, and, since October 21, 1991, the Respondent has refused. Since October 9, 1991, the Union has requested the Respondent to furnish information, and, since October 9, 1991, the Respondent has refused. We find that these refusals constitute unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after October 21, 1991, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and by refusing on and after October 9, 1991, to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Digitron Packaging, Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local No. 243, International Brotherhood of Teamsters, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment

and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees, including shipping and receiving employees, hi-lo operators, packers, plant clerical employees, inventory control employees and quality control employees employed by Respondent at its facility located at 12350 Sears Drive, Livonia, Michigan; but excluding all temporary employees employed by Temporary Associates, Inc. and/or other employers, office clerical employees, professional employees, guards, production analysts and other supervisors as defined in the Act.

(b) On request, furnish the Union information that is relevant and necessary to its role as the exclusive representative of the unit employees.

(c) Post at its facility in Livonia, Michigan, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

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[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. February 21, 1992

James M. Stephens, Chairman

Dennis M. Devaney, Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local No. 243, International Brotherhood of Teamsters, AFL-CIO, as the

exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production and maintenance employees, including shipping and receiving employees, hi-lo operators, packers, plant clerical employees, inventory control employees and quality control employees employed by Respondent at its facility located at 12350 Sears Drive, Livonia, Michigan; but excluding all temporary employees employed by Temporary Associates, Inc. and/or other employers, office clerical employees, professional employees, guards, production analysts and other supervisors as defined in the Act.

DIGITRON PACKAGING, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313-226-3219.

NOT INCLUDED
IN BOUND VOLUMES

SDR
Livonia, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIGITRON PACKAGING, INC.
Employer

and

Case 7-RC-19456

LOCAL NO. 243, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO[1]
Petitioner

DECISION AND CERTIFICATION
OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 18, 1991 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 32 for and 28 against the Petitioner, with no challenged ballots.[2]

The Board had reviewed the record in light of the exceptions and brief, has adopted the hearing officer's

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[1] The name of the Petitioner has been changed to reflect the new official name of the International Union.

[2] The initial tally of ballots showed 32 for and 28 against the Petitioner with 12 challenged ballots. The Employer and Petitioner subsequently entered into a Stipulation Resolving Challenged Ballots and Revised Tally of Ballots resolving the matter by agreeing that the challenges be sustained. On January 31, 1991, the Regional Director issued the revised tally.

findings[3] and recommendations, and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local No. 243, International Brotherhood of Teamsters, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including shipping and receiving employees, hi-lo operators, packers, plant clerical employees, inventory control employees and quality control employees employed by Digitron Packaging, Inc. at its facility located at 12350 Sears Drive, Livonia, Michigan; but excluding all temporary employees employed by Temporary Associates, Inc. and/or other employers, office clerical employees, professional employees, guards, production analysts and other supervisors as defined in the Act.

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[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 116 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

Dated, Washington, D.C., September 30, 1991.

James M. Stephens, Chairman

Dennis M. Devaney, Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

DIGITRON PACKAGING, INC.
Employer

and CASE NO. 7-RC-19456

LOCAL NO. 243, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO
Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATION ON EMPLOYER'S OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Upon a petition filed on November 13, 1990, and pursuant to a Stipulated Election Agreement executed by the parties and approved by the Regional Director for Seventh Region on December 11, 1990, an election by

secret ballot was conducted on January 18, 1991, among the employees in the appropriate unit set forth below:

> All full-time and regular part-time production and maintenance employees, including shipping and receiving employees, hi-lo operators, packers, plant clerical employees, inventory control employees and quality control employees employed by the Employer at its facility located at 12350 Sears Drive, Livonia, Michigan; but excluding all temporary employees employed by Temporary Associates, Inc. and/or other employers, office clerical employees, professional employees, guards, production analysts and other supervisors as defined in the Act.

The payroll period for eligibility purposes was the weekly period ending Saturday, December 8, 1990. At the close of the election, a Tally of Ballots was issued and copies made available to the parties in accordance with the current Rules and Regulations of the Board. The Tally showed the following results:

Votes cast for Petitioner.....	32
Votes cast against participating labor organization	28
Challenged Ballots	12
Valid Votes plus challenged ballots.....	72

The challenged ballots were sufficient in number to affect the results of the election. The Employer and Petitioner subsequently entered into a Stipulation Resolving Challenged Ballots and Revised Tally of Ballots resolving the matter by agreeing that the challenges be sustained as

the challenged ballots were cast by individuals in a classification specifically excluded from the stipulated bargaining unit. On January 31, 1991, the Regional Director for the Seventh Region issued a Revised Tally of Ballots with the following:

Approximate number of eligible voters	60
Number of Void ballots	0
Number of votes cast for Petitioner	32
Number of votes cast against participating labor organization	28
Number of Valid Votes counted	60
Number of Challenged Ballots	0
Number of Valid votes counted plus challenged ballots	60
Number of challenges sustained	12

On January 25, 1991, the Employer timely filed Objections to Conduct Affecting the Results of the Election, a copy of which the Regional Director for the Seventh Region served upon the Petitioner on said date. The objections allege, verbatim, as follows:

> 1. Immediately prior to and during the critical pre-election period, the Union, by and through its agents and through parties affiliated, sponsored and embraced by the Union, engaged and improperly encouraged supervisors of the Employer to solicit employees to sign authorization cards and to electioneer on behalf of the Union; and, through these and other violations of the Act, and conduct in violation of established NLRB election conduct precedent, coerced and restrained employees in the exercise of their rights guaranteed under the Act.
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> 2. On January 18, 1991, during the time set aside for voting, the Agent of the National

Labor Relations Board permitted individuals known to her to have been stipulated by the Parties to be supervisors to enter and remain in the polling area for an extended period of time.

3. On January 18, 1991, during the time set aside for voting, the Agent of the National Labor Relations board permitted conversations among supervisors and eligible voters while both were waiting in line to vote.

4. The coercive acts which took place immediately prior to and during the critical pre-election period and during the polling time were sufficient to affect the results of the election as the tally showed thirty-two (32) votes cast in favor of the Union and twenty-eight (28) votes cast against the Union with determinative challenges.

5. By the above and other conduct, Petitioner has interfered with and/or coerced eligible voters with regard to the exercise of their Section 7 rights and destroyed the "laboratory conditions" necessary for the conduct of an election. In addition, the conduct of the Board Agent described in paragraphs 2 and 3, above, permitted events which destroyed the "laboratory conditions" necessary for the conduct of the election.

Inasmuch as the Regional Director concluded that the Employer's Objections raised substantial and material factual issues, including credibility resolutions, he issued a Notice of Hearing on January 31, 1991. Thereafter, on February 14 and February 15, 1991, a hearing was held before the undersigned for the sole purpose of determining the issues raised by the Employer's Objections.

The hearing was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. All parties were afforded full opportunity to be heard, to present and examine witnesses, to introduce relevant evidence and to present oral testimony.

Upon the entire record in this proceeding,[1] and on the basis of my observations of the witnesses,[2] I make the following findings of fact, conclusions of law and recommendations:

STATUS OF PRODUCTION ANALYSTS

The threshold issue for the Employer's objections is whether the productions analysts are supervisors within the meaning of Section 2(11) of the Act.[3] Dick Racine, the Employer Operations Manager, testified regarding the establishment of the production analyst position. I found Mr. Racine to be a credible witness who testified in a

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[1] By letter dated March 21, 1991, the undersigned informed counsel for both parties of two errors in the record. In particular at page 52, line 19 of the transcript a question of witness Filis whether he could testify if the production analysts left the hearing room is attributed to the undersigned. In actuality Employer counsel asked this question of the witness. At page 576, line 21; the statement of the undersigned was "because there is a doubt in my mind". Hearing no objection from counsel the record is corrected in this regard.

[2] All witnesses have been credited unless otherwise noted.

[3] The parties stipulated that the evidence presented with respect to the duties, authority, wages, hours and working conditions of production analysts applied to all production analysts equally.

forthright manner with respect to the duties and authority of the production analysts.

The Employer is a contract packager engaged in the repackaging of parts for shipment to other customers at its facility in Livonia, Michigan. It's primary customer is Ford Motor Company. The Employer's facility employs approximately 60 bargaining unit employees. The Employer in addition employs a substantial number of temporary employees. The Employer's facility is comprised of a shipping and receiving dock where the parts are received and a storage facility. Once the parts are received and after some preliminary processing the parts are then moved to the production area where the parts are repackaged according to customer specifications for shipment back to Ford. The production area is comprised of 13 production lines. The parts are repackaged in various discrete steps by the production employees stationed along the line. The employees performing such repackaging are referred to as packers. There are about 80 packers working in the production area with about 40 of the packers being permanent employees and the other 40 being temporary employees employed by a temporary agency. There is a representative from the temporary agency on the premises while the temporary employees are working.

It is in the production area where the production analysts work. Prior to the establishment of the production analyst position the Employer employed a line leader on each line and three floor supervisors who oversaw the production lines. However, because of quality control problems brought to the Employer's attention by Ford, the Employer in April, 1990, created the production

analyst position for closer oversight of the packaging process. The Employer transferred two of the floor supervisors to the production analyst classification and the Employer hired nine new people for the position. At present the Employer employs 10 production analysts, with seven overseeing one line while the remaining three production analysts oversee two lines each. Each line has about five to seven packers. The production analysts report to Plant Manager of Production, Fay Richardson, and the General Supervisor of Production, Alan Talluto, a former production analyst.

Racine testified that at the time of their hire the production analysts were shown a job description (Employer exhibit #9). Racine testified that this job description was reviewed with the production analysts. The job description states that production analyst shall review and track their subordinate's performance and document and administer disciplinary actions. Racine testified that the production analysts are responsible for reviewing part specifications and setting up the packaging operation on each line. He also testified that the production analysts can assign packers to various duties on the line, review work performed by the packers and have them redo the work if they are not satisfied with the quality of the packaging. If a packer wants to leave the line he or she must obtain the permission of the production analyst. The production analysts keep track of the packers production by recording information on a work order form, which records the work time, total pieces run and crew size.

The production analysts are paid hourly and are paid overtime. Management and employees receive the same

benefits such as vacation and holiday pay and health insurance coverage. While the packers are paid within a range of $4 to $6 per hour the production analysts are paid in a range of $7 to $9.50 per hour. The production analysts work at a stand-up desk located at the beginning of each production line and wear a green apron while the packers wear street clothes with no identifying clothing. Racine testified that the production analysts do not perform any actual packaging while the line leaders, when that position was extant, would spend approximately 30% of their time in the actual packaging of parts.

With respect to the training procedure for production analysts, Racine testified that the production analysts receive 30 day reviews at which time if the Employer is satisfied with their performance they receive a 25 cent per hour wage increase. During the course of that training the production analysts will begin issuing discipline to employees for rule infractions. Racine testified that the production analysts monitor the entire shop with respect to the Employer rules for employee conduct. Racine testified that the production analysts started issuing discipline to employees in the latter part of November, 1990, when a number of them had completed their training programs. Employer Exhibits 15(a) to 15(1) are copies of discipline issued by production analysts to employees. The forms used are different in format but nevertheless bear the signature of the production analyst with some of the documents identifying the production analyst as "supervisor". I note that the earliest of the discipline is dated December 28, 1990, with the bulk of them dated in February, 1991.

Production analysts also attended meetings with management. Dick Racine conducted a meeting with production analysts on December 12, 1990 at which was discussed various production and personnel concerns. There were two other meetings held with the production analysts, on December 26, 1990 and January 2, 1991. Racine testified that the Employer had held such meetings with production analysts in April, 1990, when the position was created but had discontinued them because the plant became busy and the Employer felt that one-on-one consultation with the production analysts would be better. However, Racine replaced Barry Turner as operations manager in early November, 1990, and decided to resume the meetings in December, 1990. Since the date of election the Employer has not held any personnel meetings with production analysts and rather, according to Racine, has held "twenty minute and half hour production meetings each morning".

The production analysts also prepare employee evaluations, Racine testified that packers during their probation period are given four reviews. Employer Exhibit #11 is an example of a personnel form that the production analyst prepares. Cathy Chapman, the Employer's human resources manager, testified regarding the completion of evaluations by production analysts.[4] Chapman testified that the production analyst is informed by the personnel

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[4] A significant limitation with respect to Chapman's testimony is that she only started her employ with the Employer on December, 17, 1990. However, I found Chapman to be a credible and forthright witness concerning areas within the scope of her knowledge.

office that a particular employee's evaluation is due. The production analyst completes the evaluation which is then routed to the production manager (Fay Richardson) and to the Operations Manager (Dick Racine) and to the personnel office. Nestor Fernandez, the owner of the Employer, will also review the evaluations and write comments on them. After the personnel office reviews the evaluation it is then returned to the production analyst who will meet with the packer and go over it with the packer. In addition, Chapman testified that if one of the reviewing supervisors thinks that there should be a change in the evaluation the production analyst and the supervisor will discuss the change. Chapman performs the portion of the evaluation concerning attendance since she keeps the attendance records. Employer exhibits 16(b) to 16(q) are evaluations prepared by the production analysts.[5]

The Employer presented as a witness Alan Talluto. Talluto was hired as a production analyst on July 7, 1990, and was promoted to General Supervisor of Production in early February, 1991. Talluto testified that when he was hired he was shown the handwritten job description (Employer Exhibit #9). He also testified that he was told there was to be a six month training program for the production analyst position and that his pay would increase as he proved himself in the position. He also testified that he was told to complete employee evaluations and discuss the evaluations with the employees. He also has rotated packers on the production line so as to

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[5] I note that there is no Employer exhibit 16(a) as this was withdrawn by Employer counsel at the hearing.

reduce boredom for the packers or to place a packer to a job that he/she is better suited. Talluto testified that he did not have to obtain prior approval before doing any of the above. He confirmed that Racine did fill out certain warning forms issued to production employees, (Employer Exhibits 15c,d & f) and that Racine told him to sign them.

Phyllis Huff, a packer, testified that it was her perception that the production analyst was her supervisor. In support of such she testified that she has been told on a daily basis by production analysts what job to perform on the production line and that she has been told by production analysts not to talk so much while at work or not to go to the restroom so often. Furthermore, she confirmed that she received a written warning from production analyst Robert Sleeper. Carlos Toro, another packer, testified that the production analysts moved him from one line to another during the course of the work day.

The Petitioner presented two witnesses regarding the status of the production analysts. Michael Robertson, a production analyst, testified that prior to the commencement of the employee activity in support of the Petitioner, which he testified was about early November, 1990, he did not prepare evaluations of employees. He also contended that in September and October, 1990, about 50% of his work time was involved in the actual packaging of parts while about 15% of his work time is now involved in the packaging of parts. He attributed the change in percentage to a need to do the extra paperwork in particular the evaluations assigned to him. Robertson also testified that he made the decision himself to reduce the amount of packaging work he did because of the need to

perform the written evaluations. Robertson also testified that prior to the union activity he had no role in employee evaluations and transfers but that he now does. Robertson also testified that Fay Richardson, the production manager, decides which packers will work on each line and that if there is an absence of a packer on the line that Richardson will select the replacement packer. However, under cross examination Robertson admitted that generally the lines have the same packers assigned unless there is a transfer or a trade of one packer to another line for a specific reason. He contended that if he was not happy with an[sic] packer's work he would speak to Fay Richardson. He also, testified that prior to the employee union activity he could not recommend the discipline of employees. He related a situation prior to the Union activity where he told management that employees were drinking but that no discipline was issued to the employees. Under cross examination Robertson admitted that he did have the authority to check employee work and have the employee redo it if he was not satisfied with the work.

Robertson also testified that he was not aware at the time that he was hired that he would be functioning as a supervisor. In addition, he also testified that he did not know that he would be going through any training program and that he just "learned" the job. However, he does admit that he was told that it would take six months to rise to a wage of $8.50 per hour.

Production analyst Robert Sleeper also testified on behalf of Petitioner. Sleeper denied that at the time of his hire he was told of any training program or that he would be a supervisor. Sleeper, who was off on a medical leave

from October 3, 1990 to November 3, 1990, admits that when he returned from his medical leave he was instructed by Fay Richardson to fill out employee evaluations. In addition, he admits that after his return from medical leave he issued packers discipline. Sleeper contends that he completed evaluations but that after doing so he never saw the evaluations. He also testified that Production Manager Fay Richardson decides which packers work on each particular packaging line.

With respect to Sleeper's testimony that he was told not to show the evaluation to the employee after he had completed it, Racine testified that there had been some instances where production analysts had immediately shown the evaluation to the employee instead of completing the evaluation first and sending it through management channels for review and that at the December 12, 1990 meeting that issue had been raised and discussed with the production analysts.

With respect to the Robertson's testimony, I find it difficult to believe that Robertson was not told at the time of his hire of any training or of any expectations of him to function as a supervisor within the production analyst classification. Robertson could not remember whether he was shown Employer Exhibit #9 at the time of his hire. Racine and Talluto credibly testified on this point. Based on Robertson's demeanor and the testimony of other witnesses I discredit Robertson in this regard. As to Sleeper's testimony I again find it difficult to believe that

Sleeper was not told in some respect of his duties and training that he would receive as a production analyst.[6]

Based on the above, I find that the production analysts are supervisors within the meaning of Section 2(11) of the National Labor Relations Act. The record establishes that they are the highest paid individuals in the production portion of the Employer's operation. They do not have a regular assigned work location on the production line but instead have their own standing work desks at the beginning of each line. They wear a green apron to distinguish them from the rest of the production employees, who wear regular street clothes. In addition to each secondary indicia of supervisory status, the credible record evidence establishes that the production analysts have some limited authority to transfer packers from one location on the line to another and orally warn employees regarding their work performance. Furthermore, there is evidence that the production analysts can check packers work and if not satisfied with the work

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[6] With respect to the testimony of Robertson and Sleeper, they both made complete denials of certain claims of work and authority that they possessed as production analysts. However, in these instances I found that testimony of Dick Racine and Alan Tolluto more credible. Such is based on the fact that documentation presented by the Employer, in particular the written job description, comports with Racine and Tolluto's version of events. In addition, their version comports with the testimony of employees Carlos Toro and Phylis Huff, both of whom I found to be credible witnesses in this regard. Therefore, when the testimony of Robertson and Sleeper conflicts with that of Racine or Tolluto concerning the duties and authority of the production analysts, I credit the version of the latter.

have them redo it. I find such to be an exercise of responsible direction and indicative of a supervisor's use of independent discretion. *Superior Bakery Incorporated* 294 NLRB No. 21 (May 25, 1989); *Broyhill Company* 210 NLRB 288 (1974). In addition, I note that the creation of the production analyst position coincided with the end of the floor supervisor position. Such would indicate that the void in supervisory authority caused by the loss of the floor supervisor position was filled by the duties and authority of the production analyst.

The petitioner argues that the bestowal of supervisory authority on the production analysts by the Employer at the time that it did was a sham to give the production analysts the appearance of supervisory authority. The Employer contends that the issuance of discipline and the completion by production analysts of employee evaluations coincides with the completion by certain production analysts of the training program. The evidence establishes that the production analysts were a new classification in the spring of 1990 and that the production analysts were told at the time of their hire of their work duties and the Employer's training program. Other than the timing of the matter, there was no credible evidence establishing that the production analyst duties and authority were changed in any respect by the Employer for any reason. Regardless of the motivation by the employer for the imposition of such authority the record establishes that in December, 1990, and January 1991, the production analysts, among other duties, were involved in the formulation of employee evaluations and the issuance of discipline to employees, both of which are two traditional functions of statutory supervisors.

With respect to the evaluations, it is undisputed that the production analyst will complete a form which rates packers in seven categories with five ratings, from "unsatisfactory" to "outstanding". Each category requires exercise of independent and subjective judgment by the production analyst of a particular packer. Once completed the evaluation ascends through the chain of command with various notations on it at each level. In addition, comments are made on the evaluations regarding a particular employee's wage increase or lack thereof. The completion of these evaluations is more than a routine clerical function by the production analyst and requires the use or independent judgment which will have an effect on a packer's future treatment by management. With such authority and impact on employees it must be found that the production analysts are supervisors within the meaning of the Act. *Iron Mountain Forge Corporation* 278 NLRB 255 (1986).

As to the issuance of discipline, I do not find the fact that the discipline needs to be countersigned by higher management establishes that there is no independent judgment by the production analyst in the formulation of the discipline. *Superior Bakery Incorporated* 294 NLRB No. 21, JD slip op. at 11 (May 25, 1989). Furthermore, there is evidence that production analysts have as their responsibility to inform management of dissatisfaction with employees they supervise or any problem that arises on the job. Such a role in the discipline process has been considered a factor in the determination of supervisory status. *Clark & Wilkins Industries, Inc.* 290 NLRB No. 19, JD slip op. at 15 (May 29, 1988).

There was no evidence presented that the production analysts have the authority to hire or fire employees. However, such does not prevent a finding of supervisory status. The criteria for the establishment of supervisory authority in Section 2(11) of the Act are read in the disjunctive. Thus, the authority held by the production analysts as set forth above is sufficient to confer supervisory status. *Serendipity-Un-Ltd* 263 NLRB 768, 771 (1982); *Flexi-Van Service Center* 228 NLRB 956, 960 (1977).

I find, further, that by granting the production analysts the authority to issue discipline to employees, prepare evaluations of employees and by providing the production analysts with a separate work station the Employer has given the production analysts the appearance of authority such that employees could reasonably believe the production analysts were supervisors within the meaning of the Act. Each production employee who testified acknowledged that they considered the production analyst to be their supervisor. The Board has held that where employees have a valid basis for judgment that an individual is a supervisor, such will be given weight in resolution of supervisory status. *Wolverine World Wide, Inc.* 196 NLRB 410 (1972); *The Bama Company,* 145 NLRB 1141 (1964).[7]

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[7] The Employer argues that because the Petitioner entered into a written stipulation regarding the duties and authority of the production analysts that such should bind the Petitioner and is an indication of bad faith on the Petitioner's part regarding the issue of the production analysts eligibility. Regardless of the motivation behind the Petitioner's change with respect to the eligibility of the production analysts, the Board is not bound by parties' stipulations of eligibility even when such are written and factual in nature. *A&B Cartage, Inc.* 256 NLRB 14 (1981).

OBJECTION #1

In its first objection the Employer contends that the Petitioner improperly encouraged supervisors of the Employer to solicit employees to sign authorization cards for and to electioneer on behalf of the Petitioner.

In support of this objection the Employer presented witnesses who testified regarding the involvement of the production analysts in the organizational drive. The record establishes that the first meeting of employees regarding their interest in organizing was in early November, 1990, at the Petitioner's Union hall located in Detroit.[8] At this meeting there were about 40 employees and six to seven production analysts. Thomas Ziembovic, an organizer for the Petitioner, was also present. Carlos Toro, a packer at the Employer's facility, testified that at this meeting there were authorization cards signed. Toro also testified that there were no statements to employees by production analysts at this meeting that they should sign authorization cards nor did he observe any production analysts ask employees to sign authorization cards. Toro also testified that he was present at a meeting of employees at the Wonderland Mall in Livonia, Michigan.

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[8] I note that this meeting occurred prior to the filing of the petition herein. While the Board forbids specific reliance on pre-petition conduct as a basis for objecting to an election, pre-petition conduct may be property considered insofar as it provides meaning and dimension to related post-petition conduct, *Stevenson Equipment Company* 174 NLRB 865, fn. 1 (1969). In addition, the Board has on occasion considered pre-petition conduct as evidence of objectionable conduct when related to a union's attempt to obtain a sufficient showing of interest. *Lyons Restaurants* 234 NLRB 178 (1978).

The meeting occurred about the third week in December, 1990, and there were approximately six to eight employees and seven production analysts at this meeting. Thomas Ziembovic was not at this meeting. Toro testified that at the Wonderland Mall meeting Michael Robertson, a production analyst, stated to employees with whom he was sitting at a table that he supported the Petitioner and that the employees might get fired without a union. According to Toro, Robertson also stated that if the Petitioner was voted in that the employees would get more benefits. Toro also testified that on the day of the election Robertson and another production analyst, Dorthea Garrett, asked him how he was going to vote. Toro testified that Robertson did not ask him in a threatening manner. Toro testified that he told them that he supported the Petitioner so that he would not suffer any retaliation.[9] He also testified that he did not see any production analysts try to influence employees on the day of the election.

Alan Talluto testified that he was present at the early November, 1990 meeting at the Union hall and that Michael Robertson played a lead role at this meeting. Talluto testified that Robertson during the meeting was "sitting up front doing a lot of talking, a lot of one on one conversation with Tom" (Ziembovic). Talluto testified that Robertson said at this meeting that if they had one

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[9] I attach little importance to the statement by Toro that he told them he supported the Petitioner to avoid retaliation. His testimony was that he had not been asked in a threatening matter by the production analyst regarding his views. Furthermore, the testimony of other employees was that they had not been threatened by production analysts or witnessed production analysts threatening other employees.

more than fifty percent of the employees sign authorization cards that the Petitioner was automatically in as the bargaining representative. Robertson did not ask employees to sign authorization cards for the Petitioner. Talluto also testified that he was at attendance at the meeting at the Wonderland Mall and that Robertson "conducted" the meeting and that in response to a question Robertson told a group of about 10 employees that the Employer knew who signed the authorization cards and that if the Petitioner did not get in that the employees would be discharged. I discredit Talluto to the extent that he testified that Robertson said employees "would be discharged". Toro's version of Robertson's statement that employees "might" be discharged is a more credible version. Robertson was a low level supervisor and clearly speculating in this regard. The difference between "might" and "would" is the difference between possibility and certainty and since Robertson had demonstrated his support for the Petitioner it is highly unlikely that the Employer would have brought him into its confidence. It is more likely that Robertson was speaking of the possibility of Employer action. Therefore, based on the demeanor of the witnesses and the inherent probabilities of the events set forth in witness testimony I credit Toro in this regard.[10]

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[10] My observation of the witnesses and my examination of the record convinces me that witnesses for both sides at times only told part of the truth. In resolving credibility matters I have accepted some portions of a witness' testimony and rejected others. The Board has held that it is reasonable to accept some but not all of a witness' testimony. *PHA Incorporated* 270 NLRB 998 (1984); *Brinkman Southeast* 261 NLRB 204 (1982).

Talluto also testified that he attended a meeting at Archie's Restaurant held on December 21, 1990. At this meeting were seven production analysts and one packer, Mable Whitehurst. Thomas Ziembovic was also at this meeting. Talluto testified that Ziembovic told the production analysts that the Employer was going to contend that they were supervisors and that their votes would be challenged at the election.

Phyllis Huff testified that Robert Sleeper, a production analyst, told her about a month and a half before the election that he supported the Petitioner. She admits that they were "casually talking" when Sleeper made the comment. She also testified that she did not hear any production analyst threaten any employees regarding how employees should vote.

Jim Holliday, a maintenance employee, testified that a week before the election he heard Robertson speaking to about four employees in the shop and state that the employees needed the Petitioner and that there would be trouble if the employees did not select the Petitioner as their bargaining representative. Holliday testified that this was the only time that he heard a production analyst speaking about the Petitioner.

The Employer also presented as a witness Sergio Filis, a packer in the production area. Filis, on direct examination, was initially unwilling to testify but did so after being shown a copy of his recorded recollections by Employer counsel. Nevertheless, I was not convinced by the testimony of Filis. Filis appeared to be a very nervous witness and seemed unsure of himself and unsure of his answers to many questions. In addition, there was a

general lack of specifics in his testimony. Therefore, based on his demeanor as a witness I have not relied in any way on his testimony and I reject it as a basis for any findings of fact.

Production analyst Michael Robertson testified that he was at attendance at the meeting at the Wonderland Mall but denies making the statement that employees would be discharged if they did not select the Petitioner as the bargaining representative. Robertson testified that a statement of this nature was made by Thomas Ziembovic at a meeting at Archie's restaurant held on December 21, 1990. However, Robertson's testimony regarding what was said was so vague that I accord it little weight in this regard. Robertson also responded vaguely when asked under direct examination whether he had ever talked to an employee regarding his/her vote in the election. Robertson responded that he did not do so "in the sense that I would be encouraging or promoting a union activity". Robertson's testimony in this regard does not credibly deny the testimony of Toro that Robertson asked him how he was going to vote in the election. He also denied the statement attributed to him by James Holliday that he told employees that they needed a union at the Employer. In both respects based on the demeanor of the witnesses and the weight of the credible evidence I discredit Robertson and credit the testimony of Toro concerning his conversation with Robertson and the Wonderland Mall meeting and the testimony of Holliday.

Production analyst Robert Sleeper testified that he was at the meeting at the Wonderland Mall and that there were about six production employees in attendance. He testified that no one employee or production analyst

dominated the meeting and in particular denies that Robertson told employees at this meeting that they should vote for the Petitioner or that they would be discharged or laid off by the Employer. However, he admits that there was a question by someone as to what would happen if they did not bring the Petitioner in and that someone, he did not remember who, stated that there had been people in the past who lost their jobs. Sleeper denies that he ever told employees how he felt about the Petitioner nor did he hear any production analysts make any comments in this regard. I discredit Sleeper with respect to the denial of Robertson's comment at this meeting. Toro and Tailuto, to an extent, credibly testified on that point and Sleeper's recollections about the statement that employees had lost their jobs in the past raises doubts as to the certitude of his denial. In addition, I discredit Sleeper with respect to his denial that he told Huff that he supported the Petitioner. As noted above I found Huff to be a credible witness. In addition, Sleeper admitted that he appeared at the pre-election hearing in this matter with the Petitioner representatives but yet incredibly contends that he and not made up his mind at that time whether to support the Petitioner. I found that this testimony merits skepticism and further undermines his denial of his statement to Huff regarding his support for the Petitioner.

Based on the above I would not find the statements attributed to production analysts to constitute a sufficient basis to overturn the election.

When determining whether supervisors' pro-union conduct had an objectionable effect on an election the Board considers two factors. First, whether the employer

takes no stand contrary to the pro-union statements of the supervisors such that employees will believe that the employer favors the union. I note that the employer did not make this argument during the hearing. Furthermore, such is not the case since the Employer through meetings with employees and in literature disseminated to employees made it clear that it did not favor the Petitioner. The second factor in determining the objectionable effect of supervisors' pro-union conduct is whether employees would support the union out of fear of retaliation from those supervisors should employees not support the union.

In determining the second of the above factors, the Board will examine the extent of the supervisor's authority and the nature of the pro-union conduct. I note that the Board no longer utilizes the major/minor characterization alone to determine whether the actions of supervisors are objectionable in this regard. *Cal Western Transport,* 283 NLRB 453 (1987). The Board instead requires a thorough examination of all of the relevant aspects of a supervisor's authority instead of a summary characterization of a supervisor as "major" or "minor".

In the instant matter the alleged objectionable supervisory interference is limited to remarks made by the production analysts voicing their views as any other employee would. There was nothing in the remarks indicating retaliation by the production analysts themselves should the Petitioner not win the election. The closest statement amounting to claims of retaliation by a production analyst is Holliday's version of Robertson's statement that "there would be trouble" if the Petitioner did not win the election. However, in light of other testimony

regarding Robertson's statements, Robertson was at best referring to action by higher management and not by himself. Based on the testimony of other witnesses I am convinced that the message conveyed by Robertson was that the Employer and not he in his capacity as production analyst would be the source of the trouble. The Board has found such circumstance to be an insufficient basis to overturn an election. *Sil Base Co.* 290 NLRB No. 157 (September 21, 1988) With respect to Robertson's statement at the Wonderland Mall meeting that employees should vote to retain their jobs, such again is the expression of a low level supervisor who demonstrated no special basis for his assertion. cf. *Flint Motor Inn Company d/b/a Sheraton Motor Inn* 194 NLRB 733 (1971). Furthermore, the statements attributed to Robertson of Employer anti-union retaliation are generally held to have a reasonable tendency to dissuade employees from supporting a union even when those threats are transmitted by a supervisor friendly to the union. Thus, Robertson's comments cannot be used as a basis to set aside an election won by the Petitioner. *B.J. Titan Service Company* 296 NLRB No. 88, fn.2 (September 18, 1989). Based on the above, I would find that the supervisory involvement was limited in this regard and not find it as a basis for meritorious objections. *Howard Johnson Motor Lodge* 272 NLRB 303 (1984); *Bally's Park Place, Inc.* 265 NLRB 703 (1982).

OBJECTION #2 & #3

In these objections the Employer claims that the Board Agent conducting the election on January 18, 1991, allowed individuals known to her to have been stipulated

by the parties to be supervisors, in particular the production analysts, to enter and remain in the polling area for an extended period of time. In addition, the Employer also contends that there were conversations among supervisors (production analysts) and eligible voters while both were waiting in line to vote.

The record establishes that voting was held in the office conference room. The conference room has a door leading into it from the production area. There are windows facing into the conference room from the production area but at the time of the election they were covered. One employee at a time would enter the conference room to vote and the door to the conference room was shut after the employee entered the conference room to vote. Employees lined up outside of the conference room door to wait to vote.

The voting was from 1:30pm to 2:30pm. There was a release schedule used with the production lines shutting down at 2:00pm and the packers voting from 2:00pm to 2:30pm. In addition, at 2:00pm the Employer called a meeting of production analysts in Dick Racine's office. At 2:00pm seven of the production analysts came to the voting area and got in line to vote. Dick Racine testified that when only five production analysts appeared for the 2:00pm meeting he concluded that the remaining production analysts had gone to vote. Racine testified under cross examination that he "instructed" the production analysts in attendance at the 2:00pm meeting to go vote. However, under redirect examination he modified his testimony and stated that the production analysts were told that their "supervisory counterparts were voting" and that they were "given the opportunity to vote. It was

left up to them, as I recall." As a result of Racine's statements the remaining production analysts went to the voting area and voted. The votes of all the production analysts were challenged ballots.

Alan Talluto testified that he attended the 2:00pm meeting and that Racine told the production analysts that there was no meeting because the other production analysts were in line to vote and that they (the production analysts in attendance at the meeting) could also vote if they desired. Talluto did go to vote and testified that while in line he heard employees make comments to him and the other production analysts who attended the meeting and had come to vote that they were sent to counteract the seven votes of the production analysts who had initially come to vote. Talluto testified that Mable Whitehurst, an employee, while in line began pointing at employees in line stating that with these employees voting they did not have a chance.

Maintenance employee Jim Holliday testified that he was asked by Racine to accompany another employee to the voting area because Racine was concerned about this employee being intimidated. Holliday testified that while they were in line the employee "ducked around in front of me" when the employee saw Mable Whitehurst, an employee who Holliday contended was vocal about her support for the Petitioner. Holliday testified that he saw four production analysts in line to vote and that employees in line to vote "seemed to be" upset that the production analysts were voting. Holliday testified that he did not hear the production analysts while they were in line say anything about the Petitioner or make any statements to employees as to how they should vote.

Production analyst Michael Robertson was one of the production analysts who did not go to the 2:00pm meeting and instead went to vote. He denied that he spoke about the Petitioner while waiting in line to vote, Robertson testified that he was in line about 2 minutes. He entered the voting area to vote and after he voted he left the voting area and went to a lunch area next to the conference room smoking area sectioned off by the Employer for the election. Robert Sleeper testified that he and the six other production analysts initially attempting to vote were in a group and that Mable Whitehurst was standing in line with them. Sleeper testified that he was in line about 45 minutes waiting to vote.

Based on the above I would not find the actions of the production analysts in attempting to vote sufficient to constitute a basis for overturning the election. There was no testimony presented by any witness that the production analysts while in line attempted to even start a conversation with another employee other than Mable Whitehurst let alone attempt to coerce employees regarding their vote.

With respect to the Board Agent's conduct, the record establishes that any comments made by either production analysts or employees would have been outside of the conference room while the employees were waiting in line to vote. With the door closed leading into the voting area any comments would have most likely not been heard by the Board Agent or by any employee in the conference room attempting to vote. As to the contention that simply allowing the production analysts to vote was objectionable, the challenge procedure has been established to permit eligibility questions to be determined in

an orderly manner. The challenge process requires that the challenged voter be in the polling place to cast a challenged ballot. Therefore, the Board Agent's action in allowing the production analysts to enter the polling place was proper since there had been no determination by the National Labor Relations Board regarding the status of the production analysts and their eligibility to vote in the election. *Equitable Equipment Company, Inc.* 214 NLRB 939 (1974).

In addition, it should be noted that the Employer allowed the production analysts in attendance at the 2:00pm meeting to approach the voting area, stand in line with the other employees, and attempt to vote. The Board will not allow an employer to succeed in overturning an election based on the conduct within the employer's control of its own supervisors. *Skogrand-Buesing, Inc.* 241 NLRB 292 (1979). In this instance by the Employer allowing five production analysts to vote it contributed to the situation that it has proffered as the basis for objections. Furthermore, there was an opportunity for the Employer to impede the production analysts from voting. Racine contends that he had a conversation with Robertson at 2:00pm at the time that the production area was shutting down to let the production employees vote. Racine told Robertson of the 2:00pm meeting for production analysts in his office. Robertson told him that the Petitioner contended he could vote and that he was going to do so. Racine, other than simply saying "you're not eligible to vote" made no effort to deter Robertson from going to vote and no discipline was issued to Robertson for not attending the meeting. Racine did testify that the

Employer considered such discipline but that it would "not be appropriate at this time".

With respect to the conduct of employees in line to vote, I do not find any conduct engaged in by employees as set forth in the record in particular that of Mable Whitehurst, to constitute a basis to overturn the results of the election. There was no evidence that Whitehurst or any other employee was functioning as an agent of the Petitioner in any respect. cf. *Bristol Textile Co.* 277 NLRB 1637 (1986); *Bio-Medical of Puerto Rico* 269 NLRB 827 (1984). Absent evidence of agency, one must examine whether the acts of employees were of such a nature to create a general atmosphere of fear or reprisal rendering a free choice in an election impossible. *Westwood Horizons Hotel* 270 NLRB 802 (1984). In the instant matter I do not find the actions of any employee sufficient to constitute a basis for overturning the election.

OBJECTION #4

Objection #4 is a summary of the allegations made in the prior paragraphs. In accordance with the determinations above I recommend that this objection be overruled.

OBJECTION #5

In this objection the Employer contends that the conduct as described above destroyed the "laboratory conditions" necessary for the conduct of an election. For the reasons set forth above I recommend that this objection be overruled.

RECOMMENDATIONS

For the reasons stated above, I recommend that Employer Objections 1, 2, 3, 4 and 5 be overruled. It is further recommended that the results of the election be upheld by certification of the Petitioner as the exclusive collective bargaining representative of the employees in the unit described above.

PLEASE TAKE NOTICE that within fourteen (14) days of service of this report, any party may file with the National Labor Relations Board in Washington D.C. an original and eight (8) copies of exceptions to this report, with or without supporting brief, which shall be printed or otherwise legibly duplicated. Immediately upon the filing of such exceptions, with or without brief, the party filing same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties and shall file a copy with the Regional Director for the Seventh Region. A statement of service shall be made to the Board immediately with the filing of exceptions. (See Section 102.69(f) as to the procedures and the time limit for filing an answering brief to exceptions.) If no exceptions are filed to this report, the Board may decide the matter forthwith upon the record or may make other disposition of the case.

Dated at Detroit, Michigan this 8th day of April, 1991.

/s/ Patrick Labadie

Patrick Labadie, Hearing Officer
National Labor Relations Board
Seventh Region
Patrick V. McNamara Federal Building
Room 300, 477 Michigan Avenue
Detroit, Michigan 48226

Nos. 92-5316/5487

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIGITRON PACKAGING, INC., Petitioner/Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner.	)	ORDER (Filed Aug. 4, 1993)

BEFORE: JONES and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Mr. Mark S. Shiffman
Jackson, Lewis, Schnitzler & Krupman
1100 First Avenue
Suite 1100 First & Market Building
Pittsburgh, PA 15222

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIGITRON PACKAGING, INC.,	)	
Petitioner,	)	92 5316 Petition For Review
v.	)	(Filed March 5, 1992)
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

Petitioner, Digitron Packaging, Inc., petitions the Court for review of the attached Order of the National Labor Relations Board in Case Number 7-CA-32494, finding that the Petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act. (29 U.S.C. 158(a)(1) and (5)). The Order was entered on February 21, 1992. The Petitioner petitions the Court to set aside the Order in its entirety.

/s/ Mark S. Shiffman
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ATTORNEYS FOR PETITIONER

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By /s/ Mary Patterson
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIGITRON PACKAGING, INC., Petitioner,	)	Nos. 92-5316 92-5487
v.	)	
NATIONAL LABOR RELATIONS BOARD Respondent.	)	

MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR PUBLICATION OF OPINION

To the Honorable, the Judges of the United States Court of Appeals for the Sixth Circuit:

On June 1, 1993, a panel of this Court (Circuit Judges Jones and Suhrheinrich, Senior Circuit Judge Wellford dissenting) issued an unpublished opinion in the instant case. The National Labor Relations Board, by its Deputy Associate General Counsel, moves the Court, pursuant to Local Rule 24, to publish its opinion, and shows:

1. Local Rule 24(b) creates "a presumption in favor of publication of signed and per curiam opinions" which is appropriately applied in this case, as shown below.

2. The Court has written an opinion that addresses several important recurring issues under the National Labor Relations Act ("the Act"). First, the opinion discussed and affirms the Board's ruling that the expression of support for a union by a small minority of supervisors (the "production analysts") who exercised minimal authority over employees did not, absent express or

implied threats, invalidate the results of the representation election. The opinion carefully distinguishes Board and Court cases cited by the Company, including in-circuit precedent, which address the significance of the level of authority exercised by a supervisor who expresses support for a union during an election campaign. (Slip op. at 12-16.) Although this issue is a recurring one for the Board, this Court has not addressed it in recent years.

3. In addition, the opinion addresses the issue created by the presence of the production analysts in the voting line during the election, inasmuch as these employees were subsequently determined to be supervisors for the purposes of the Act. Under settled law, the stationing of statutory supervisors where they will be able to determine which employees have voted in a Board election may have a coercive impact on the employees' exercise of their protected rights. See e.g. *Performance Measurements Co., Inc.*, 148 NLRB 1657, 1659 (1964).

In the instant case, the opinion rejected the Company's contention that the presence of the production analysts, without more, was a sufficient basis to invalidate the election. In agreement with the Board, the Court found (slip op. at 16-17), that the presence of the production analysts was harmless in the absence of actual conduct "which would have impeded a free and fair election." Because the supervisory status of disputed employees is frequently not adjudicated by the Board until after the election, their presence in a voting line is a situation that recurs. We are aware, however, of no authority in this or other circuits that, like this Court's

opinion, expressly upholds the Board's position on this important matter.

4. Local Rule 24(a)(iii) provides that an opinion of the Court can be considered for publication if "it discusses a legal or factual issue of continuing interest." Accordingly, for the foregoing reasons, publication of the opinion would provide significant guidance in this area to future litigants as well as to the labor bar in general.

5. Moreover, pursuant to Local Rule 24(a)(iv), the opinion can be considered for publication because "it is accompanied by a . . . dissenting opinion."

6. In these circumstances, the general, rather than restricted, availability of the Court's opinion is warranted under Local Rule 24(b).

WHEREFORE, the Board respectfully requests that the Court publish its opinion in this case.

Respectfully submitted,

Aileen A. Armstrong
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

By /s/ Robert N. Herman
Robert N. Herman, Attorney
(202) 254-6430

Dated at Washington, D.C.
this 8th day of June 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIGITRON PACKAGING, INC.,	)	Nos. 92-5316
Petitioner,	)	92-5487
	)	Board Case No.
v.	)	7-CA-32494
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the Board's Motion for Publication of Opinion in the above-captioned case has this day been served by first class mail upon the following counsel at the address listed below:

Mark S. Shiffman, Esq.
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1st & Market Building, Suite 1100
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/s/ Aileen A. Armstrong (by ENH)
Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this 8th day of June, 1993.

(2)

Supreme Court, U.S.
FILED
OCT 29 1993
OFFICE OF THE CLERK

No. 93-324

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIGITRON PACKAGING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supported the Board's finding that the pro-union conduct of supervisors during a union election campaign did not have a tendency to coerce employees into voting for the union out of fear of retaliation by those supervisors.

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In the Supreme Court of the United States

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is unreported, but the judgment is noted at 995 F.2d 1066 (Table). The decision and order of the National Labor Relations Board (Pet. App. 22a-30a) is reported at 306 N.L.R.B. No. 67. The underlying decision and direction of election (Pet. App. 31a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1993. A petition for rehearing was denied on August 4, 1993. Pet. App. 64a. The petition for a writ of

certiorari was filed on August 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a company that repackages automobile parts for shipment, has approximately 60 production and maintenance employees. The production or packaging employees are supervised by 12 production analysts (PAs). Pet. App. 38a-39a.

PAs track and record the overall performance of the packers on the line they are supervising. PAs can require packers to redo unsatisfactory work, give oral warnings, and have "limited authority" to transfer packers to another line. Pet. App. 46a. PAs are responsible for evaluating the performance of the packers whom they supervise. Those evaluations are then reviewed by the senior officers of the petitioner. *Id.* at 42a, 48a. PAs have no authority to hire or fire employees. *Id.* at 49a.

In early November, 1990, Local No. 243, International Brotherhood of Teamsters (the Union) began an organizing campaign among petitioner's production and maintenance employees. Pet. App. 50a. At the initial organizational meeting, about 40 employees and seven PAs met with Union Organizer Tom Ziembovic at the Union's meeting hall. *Ibid.* PA Michael Robertson sat at a table at the front of the hall. At one point, Robertson told the group that "if [we] had one more than fifty percent sign authorization cards * * * the [Union] was automatically in as the bargaining representative." *Id.* at 51a-52a. Neither Robertson nor any other PA distributed authorization cards or solicited signatures at this meeting or at any subsequent time. *Id.* at 50a, 52a, 56a. On November 13, 1990, the Union filed a petition for a representation election with the Board's regional office. *Id.* at 33a.

As the campaign progressed, several additional incidents occurred in which PAs expressed support for the

Union to the production workers. In early December, PA Robert Sleeper told employee Phyllis Huff that he supported the Union during a casual conversation that occurred while Huff was working. Pet. App. 53a. In mid-December, a group of about seven employees and seven PAs met informally, with no union representative present, at a restaurant in a nearby shopping mall. Robertson said that he supported the Union because employees would get better benefits. In response to a question, Robertson said that petitioner would know who signed union authorization cards and employees might be fired if the Union lost. *Id.* at 50a-51a, 52a.

On about January 11, 1991, Robertson told four employees he supervised that petitioner needed a union and that there "would be trouble" if the employees did not select the Union as their bargaining representative. Pet. App. 53a. On January 18, the day of the Board representation election, Robertson, accompanied by PA Dorothea Garrett, asked employee Carlos Toro in a nonthreatening manner how he was going to vote in the election. *Id.* at 51a.

2. At the representation election, the 12 PAs voted, subject to challenge.[1] Because the initial tally (without including the challenged ballots) showed 32 votes for the

[1] A representation hearing had previously been held to determine unit coverage and other issues pertaining to the election. At that hearing, the Union and petitioner stipulated that the PAs were supervisors and were therefore excluded from the bargaining unit. Pet. App. 34a; Company Hearing Exh. 4. Because the parties' stipulation as to an employee's supervisory status is not binding on the Board, see Pet. App. 49a n.7, employees whose status is unsettled may vote in an election subject to challenge. See, *e.g.*, *A & B Cartage, Inc.*, 256 N.L.R.B. 14, 14 & n.2 (1981); *NLRB* v. *Montgomery Ward & Co.*, 242 F.2d 497, 501-502 (2d Cir. 1957); *Net Television, Inc.*, 252 N.L.R.B 640, 640-641 (1980). Subsequent to entering into the stipulation, the Union reconsidered its position and advised the PAs to vote in the election.

Union and 28 against it, the challenged ballots could have affected the result of the election. Pet. App. 34a. Petitioner and the Union subsequently agreed, however, that the challenges should be sustained, because the challenged ballots were cast by individuals in a classification specifically excluded from the stipulated bargaining unit. The Regional Director then issued a revised tally showing that the Union had won by a 32-28 vote. *Id.* at 34a-35a.

Petitioner filed objections to the election. In Objection 1, petitioner alleged that the Union improperly encouraged supervisors to solicit employees to sign authorization cards and urge them to support the Union. In Objections 2 and 3, petitioner alleged that the Board agent who conducted the election improperly permitted supervisors to be present in the polling area during the election, and improperly "permitted conversations among supervisors and eligible voters while both were waiting in line to vote." Pet. App. 34a-36a.

After an evidentiary hearing, the Board's hearing officer agreed with the parties' stipulation that the PAs were supervisors, but recommended that petitioner's objections to the election nonetheless be overruled. Pet. App. 37a-63a. The hearing officer noted that the question whether an election should be set aside because of pro-union conduct by supervisors depends on "whether employees would support the union out of fear of retaliation from those supervisors should employees not support the union." *Id.* at 56a. In making that determination, the Board examines "the extent of the supervisor's authority and the nature of the pro-union conduct." *Ibid.* The hearing officer concluded that the alleged objectionable conduct of Robertson and Sleeper was insufficient to warrant setting aside the election.

The hearing examiner explained that the PAs were "voicing their views as any other employee would" and

did not suggest that they would retaliate should the Union lose the election. Pet. App. 56a. The hearing officer concluded that Robertson's message was that the employees needed the Union because of possible retaliation by "higher management," not by him in his capacity as a PA. *Id.* at 57a. Moreover, the possibility of retaliation suggested by Robertson is "generally held to have a reasonable tendency to dissuade employees from supporting a union even when those threats are transmitted by a supervisor friendly to the union." *Ibid.* Those comments therefore could not be the basis for setting aside an election in favor of the Union.

The hearing officer also rejected petitioner's contention that the PAs should not have been allowed to be present in the polling place to cast challenged ballots. Under Board procedures, employees whose supervisory status is open to question are permitted to vote subject to challenge, and must be allowed in the polling area for that purpose. Pet. App. 60a-61a. The hearing officer, noting that petitioner allowed the PAs to vote, also observed that the Board will not set aside an election based on conduct within the employer's control. *Id.* at 61a.

3. The Board denied petitioner's exceptions to the hearing officer's report and certified the Union as the employees' bargaining representative in the stipulated unit. Pet. App. 31a-32a. Thereafter, petitioner refused to bargain with the Union. *Id.* at 25a. The Board, on summary judgment, found that petitioner's refusal to bargain and furnish relevant information violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and it entered an appropriate order. Pet. App. 25a, 26a-28a.

4. The court of appeals upheld the Board's decision and enforced its bargaining order. Pet. App. 1a.

The court concluded that substantial evidence supported the Board's finding that Robertson's and

Sleeper's expressions of support for the Union "did not have a tendency to coerce employees into voting for the Union out of fear of retaliation." Pet. App. 12a. Although several PAs attended meetings at the union hall, none distributed authorization cards or solicited employees to sign them. *Id.* at 11a-12a. Moreover, substantial evidence supported the Board's finding "that Robertson's and Sleeper's actions and comments were made under noncoercive and nonthreatening circumstances." *Id.* at 12a. In view of the "limited" nature of the PAs' supervisory role, the court concluded that "it was unlikely that Robertson's or Sleeper's audience would treat [their] statements as something other than [their] personal speculations or feelings." *Id.* at 13a. Finally, the court agreed that it was not improper for the PAs, whose supervisory status had not been determined by the Board, to be present in the polling area for the purpose of voting. *Id.* at 16a-17a. The court concluded that any conversations between the PAs and the employees at the voting center were not such as would have impeded a free and fair election. *Ibid.*[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

Petitioner argues (Pet. 9-10) that the appropriate standard for evaluating whether pro-union supervisory conduct tainted an election is whether the conduct at issue would "reasonably tend[ ] to have a coercive effect" on the employees, as measured by "both the extent of the

[2] Senior Judge Wellford dissented, arguing that the Board erred in "failing to find that the supervisory irregularities and misconduct present here precluded a free and fair election." Pet. App. 21a.

supervisor's authority and the extent of his pro-union activity." *NLRB* v. *Island Film Processing, Inc.*, 784 F.2d 1446, 1451 (9th Cir. 1986).[3] Petitioner contends (Pet. 10-13) that the court of appeals failed to apply that standard and thereby created a conflict in the circuits warranting this Court's review. Contrary to petitioner's argument, there is no difference in approach between the court of appeals here and the Ninth Circuit. Applying the very standard petitioner espouses to the facts of this case, the court of appeals properly determined that the supervisory conduct did not warrant setting aside the election.

The court of appeals concluded that the record supported the Board's finding that the alleged objectionable "conduct did not have a *tendency* to coerce employees into voting for the Union out of fear of retaliation." Pet. App. 12a (emphasis added). Moreover, the court looked to the nature and extent of the supervisors' pro-union activity and also to the extent of their authority. In conducting that analysis, the court noted that only two of twelve PAs engaged in any organizing activity; that the PAs had limited authority over the employees they supervised;[4] that their conduct was essentially limited to ex-

[3] Petitioner does not dispute the Board's longstanding rule that pro-union supervisory conduct is not objectionable unless it has a potential for "coerc[ing] an employee into supporting the union out of fear of future retaliation by a union-oriented supervisor." *Sheraton Motor Inn*, 194 N.L.R.B. 733, 734 (1971). As petitioner notes (Pet. 10), the Board will also set aside an election where supervisors actively encourage employees to vote for the union if the employer takes no position to the contrary and employees might be led to believe the employer supports the union. *Sheraton Motor Inn*, 194 N.L.R.B. at 734.

[4] Petitioner errs in suggesting (Pet. 12-13 & n.4) that the court of appeals relied on a categorical distinction between major and minor supervisors in upholding the Board's order. On the contrary, the court assessed the PAs' actual responsibilities and did

pressing their personal views; and that the PAs did not distribute or solicit signatures on authorization cards or ask any employee to vote for the Union. *Id.* at 12a-16a. After considering those factors, the court properly concluded that substantial evidence supported the Board's conclusion that the supervisors' conduct would not have tended to coerce the employees into voting for the union.

As the court of appeals observed (Pet. App. 15a), the facts were markedly different in the Ninth Circuit cases on which petitioner relies.[5] In *Island Film Processing Co.*, the supervisors "signed authorization cards in the presence of other employees" and "engaged in almost continuous conversations at the work place." 784 F.2d at 1452-1453. Moreover, all the supervisors at issue "vocalized their * * * support [of the Union to] the employees who voted." *Id.* at 1453. On those facts, the Ninth Circuit concluded that the supervisors' activity had the tendency to coerce the employees' exercise of free choice and therefore set aside the election. That result was attributable, however, to the facts of that case, and not to any difference in approach between the Ninth Circuit and the court of appeals in this case.[6]

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not rely simply on their position in the management hierarchy. The Ninth Circuit follows the same approach. See *NLRB* v. *Cal-Western Transport*, 870 F.2d 1481, 1485 & n.2 (1989); *Island Film Processing Co.*, 784 F.2d at 1451-1452.

[5] Distinguishing the cases on their facts, the court of appeals noted that its decision was consistent with the Ninth Circuit's decision in *NLRB* v. *Island Film Processing Co.*, *supra*. See Pet. App. 15a.

[6] In two subsequent cases with facts more similar to those in this case, the Ninth Circuit concluded that supervisory involvement in organizing campaigns did not have the tendency to taint representation elections. In *Cal-Western Transport*, 870 F.2d at 1485, the court concluded that the conduct of a supervisor who expressed support for the union at four or five meetings and engaged in other pro-union activity did not warrant setting aside an elec-

The dispute in this case is therefore over whether the court of appeals properly concluded on the facts of this case that the supervisors' conduct did not have the tendency to coerce the employees' exercise of free choice in the representation election. That fact-bound issue does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, it is clear that the court of appeals was correct in concluding that substantial evidence supported the Board's finding that the nature and scope of the PAs' pro-union activity did not create any significant danger of coercion, especially in light of the PAs' limited supervisory authority. See Pet. App. 12a-16a.

tion, because his activity was not coercive and his supervisory authority was limited. In *Napili Shores Condominium* v. *NLRB*, 939 F.2d 717, 720 (9th Cir. 1991), the court held that a supervisor's alleged statement that the employees needed a union to obtain better wages was not objectionable, because such a statement would have reflected only his personal views and "there [was] no indication that [he] would have retaliated against [the employees] had they determined not to vote for the Union."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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